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CHARLES ELMORE CR
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No. 17, Orig.

IN THE

Supreme Court of the United States

EX PARTE, THE BAKELITE CORPORATION,
Petitioner,

In the Matter

of

The Investigation of alleged unfair methods of competition and unfair acts in the importation and sale of Synthetic Phenolic Resin, Form C, and articles made wholly or in part thereof.

MOTION AND PETITION FOR WRIT OF PROHIBITION

Albert MacC. Barnes, Jr.,
Attorney for Petitioner.

PRESS OF FREMONT PAYNE, NEW YORK CITY

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IN THE

Supreme Court of the United States

Ex Parte, The Bakelite Corporation, Petitioner,

In the Matter

of

The Investigation of alleged unfair methods of competition and unfair acts in the importation and sale of Synthetic Phenolic Resin, Form C, and articles made wholly or in part thereof.

MOTION FOR LEAVE TO FILE PETITION FOR WRIT OF PROHIBITION

And now comes the petitioner, The Bakelite Corporation, a corporation organized and existing under the laws of the State of Delaware, by Albert MacC. Barnes, Jr., its attorney, and it moves for leave to file the petition hereto annexed for a writ of prohibition, and it further moves that a rule be entered and issued directing the Presiding Judge and the Associate Judges of the United States Court of Customs Appeals to show cause why a writ of prohibition should not issue against them, in accordance with the prayer of the said petition; and why said petitioner should not have such other and further relief in the premises as may be just and meet.

Albert MacC. Barnes, Jr.,
Attorney for Petitioner,
Office and P. O. Address,
No. 2 Rector Street,
New York, N. Y.

Petition for Writ of Prohibition

To the Honorable, the Chief Justice and Associate Justices of the Supreme Court of the United States:

Comes now The Bakelite Corporation, a corporation organized and existing under the laws of the State of Delaware and gives this Honorable Court to understand and be informed:

That on the 16th day of December, 1925, your petitioner, having its principal place of business in the City of New York, and certain of its subsidiaries and consumers, filed a complaint with the United States Tariff Commission complaining of certain unfair methods of competition and unfair acts in the importation of articles into the United States tending to injure their business of manufacturing and selling articles composed of Synthetic Phenolic Resin.

The complaint was based upon the provisions of Section 316 of the Tariff Act of September 21, 1922; 42 Stat. L. 858; U. S. C. Title 19, Par. 176.

Such Section reads as follows:

> (a) That unfair methods of competition and unfair acts in the importation of articles into the United States, or in their sale by the owner, importer, consignee, or agent of either, the effect or tendency of which is to destroy or substantially injure an industry, efficiently and economically operated, in the United States, or to prevent the establishment of such an industry, or to restrain or monopolize trade and commerce in the United States, are hereby declared unlawful and when found by the President to exist shall be dealt with, in addition to any other provisions of law, as hereinafter provided.
>
> (b) That to assist the President in making any decisions under this Section the United States Tariff Commission is hereby authorized to investigate any

alleged violation hereof on complaint under oath or upon its initiative.

(c) That the commission shall make such investigation under and in accordance with such rules as it may promulgate and give such notice and afford such hearing, and when deemed proper by the commission such rehearing with opportunity to offer evidence, oral or written, as it may deem sufficient for a full presentation of the facts involved in such investigation; that the testimony in every such investigation shall be reduced to writing, and a transcript thereof with the findings and recommendations of the commission shall be the official record of the proceedings and findings in the case, and in any case where the findings in such investigation show a violation of this section, a copy of the findings shall be promptly mailed or delivered to the importer or consignee of such articles; that such findings, if supported by evidence shall be conclusive, except that a rehearing may be granted by the commission, and except that, within such time after said findings are made and in such manner as appeals may be taken from decisions of the United States Board of General Appraisers, an appeal may be taken from said findings upon a question or questions of law only to the United States Court of Customs Appeals by the importer or consignee of such articles; that if it shall be shown to the satisfaction of said court that further evidence should be taken, and that there were reasonable grounds for the failure to adduce such evidence in the proceedings before the commission, said court may order such additional evidence to be taken before the commission in such manner and upon such terms and conditions as to the court may seem proper; that the commission may modify its findings as to the facts or make new findings by reason of additional evidence, which, if supported by the evidence, shall be conclusive as to the facts except that within such time and in such manner an appeal may be taken as aforesaid upon a question or questions of law only; that the judgment of said court shall be final, except that the same shall be subject to review by the United States Supreme Court upon certiorari applied for within three months after such judgment of the United States Court of Customs Appeals.

(d) That the final findings of the commission shall be transmitted with the record to the President.

(e) That whenever the existence of any such unfair method or act shall be established to the satisfaction of the President he shall determine the rate of additional duty, not exceeding 50 nor less than 10 per centum of the value of such articles as defined in Section 402 of Title IV of this Act, which will offset such method or act, and which is hereby imposed upon articles imported in violation of this Act, or, in what he shall be satisfied and find are extreme cases of unfair methods or acts as aforesaid, he shall direct that such articles as he shall deem the interests of the United States shall require, imported by any person violating the provisions of this Act, shall be excluded from entry into the United States, and upon information of such action by the President, the Secretary and the Treasury shall, through the proper officers, assess such additional duties or refuse such entry; and that the decision of the President shall be conclusive.

(f) That whenever the President has reason to believe that any article is offered or sought to be offered for entry into the United States in violation of this section but has not information sufficient to satisfy him thereof, the Secretary of the Treasury shall, upon his request in writing, forbid entry thereof until such investigation as the President may deem necessary shall be completed; *Provided*, That the Secretary of the Treasury may permit entry under bond upon such conditions and penalties as he may deem adequate.

(g) That any additional duty or any refusal of entry under this section shall continue in effect until the President shall find and instruct the Secretary of the Treasury that the conditions which led to the assessment of such additional duty or refusal of entry no longer exist.

The Tariff Commission after hearing the testimony submitted by the petitioner and the testimony of the importers appearing in opposition thereto, to wit: **Frischer & Co., Inc., Randes Importing Company, Transatlantic Clock & Watch Company, Inc., Western Briar Pipe Company, and National Council of Importers & Traders, Inc.,** appearing by permission of the Tariff Commission, on May 25, 1927, made its findings to the President and recommended to the President the issuance of an embargo against the importation of merchandise composed of Synthetic Phenolic Resin as described in the findings of the Commission.

From these findings and recommendations the respondents, Frischer & Co., Inc., and others, filed an appeal to the United States Court of Customs Appeals under the provisions of sub-division (c) of Section 316, *supra*, entitled as follows:

UNITED STATES COURT OF CUSTOMS APPEALS,

SUIT NO. 3009.

In the Matter

of

The Investigation of alleged unfair methods of competition and unfair acts in the importation and sale of Synthetic Phenolic Resin, Form C, and articles made wholly or in part thereof.

FRISCHER & CO., INC., RANDES IMPORTING COMPANY, TRANSATLANTIC CLOCK & WATCH COMPANY, INC., WESTERN BRIAR PIPE COMPANY, NATIONAL COUNCIL OF IMPORTERS & TRADERS, INC.,

Appellants,

BAKELITE CORPORATION, ABSE BROTHERS, EMBED ART CORPORATION, KAUFMANN BROS. & BONDY, REISS-PREMIER PIPE CO., S. M. FRANK & CO., INC., WM. DEMUTH & CO., L. & H. STERN, INC.,

Appellees.

On the 22nd day of December, 1927, your petitioner, The Bakelite Corporation, through its attorneys, moved to dismiss the appeal on the ground that the said United States Court of Customs Appeals had no jurisdiction to entertain the same. Thereafter on May 25, 1928, after the submission of briefs and oral argument, the United States Court of Customs Appeals denied said motion to dismiss and filed an opinion, a copy of which is hereto annexed, marked Exhibit "A," and also an order providing:

> "Appellees' motion to dismiss said appeal for want of jurisdiction, and appellants' motion to strike out the appearance of Barnes, McKenna & Halstead for appellees having been brought on to be heard before the court and due consideration thereon having been had, it is
>
> ORDERED that appellees' motion to dismiss be, and it is hereby overruled; it is
>
> FURTHER ORDERED that appellants' motion to strike out the appearance of Barnes, McKenna & Halstead for appellees be, and the same is hereby overruled."

The matters in question involved in the appeal from the findings and recommendations of the Tariff Commission to the President are in the opinion held to constitute a case or controversy, and the appeal provided for in Section 316 (c) is held not to offend the provisions of Article III, Sections 1 and 2 of the Constitution of the United States.

The basis of the motion to dismiss the appeal was that Congress had no power to authorize a Federal Court to entertain an appeal of the type attempted to be provided for in Section 316 in that such an appeal is not taken in a case or controversy, that there is no judgment which is sought to be reviewed and that the findings of the Tariff Commission herein sought to be reviewed are advisory findings of fact only, that said Tariff Commission is in no sense a court nor can it issue a judgment and hence no appeal therefrom can be provided for by Congress to a Federal Court under the Constitution.

The Court of Customs Appeals in its opinion held that that court was an inferior court of the United States, created under and by virtue of the provisions of Article III of the Constitution and that the jurisdiction of said court was limited to the considerations of such cases and controversies as are provided for in Section 2 of said article, but determined that the matter as it was presented to that court was such a case or controversy.

The provisions of Section 316, *supra*, attempt to provide for a unilateral appeal, on the part of importing interests only, to the Court of Customs Appeals on questions of law only from the findings made by the United States Tariff Commission.

The powers of the United States Court of Customs Appeals as set forth in Section 316, however, are not the usual powers granted to an appellate court to affirm, reverse or modify, but said section provides "that if it shall be shown to the satisfaction of said court that further evidence should be taken and that there were reasonable grounds for the failure to adduce such evidence in the proceedings before the Commission, said court may order such additional evidence to be taken before the Commission in such manner and upon such terms and conditions as to the court may seem proper."

From this quotation it is suggested that the powers of the Court of Customs Appeals upon such an appeal would seem to be limited to expressing its opinion upon questions of law, if any arise in the matter, and a remanding of the matter to the Tariff Commission so that "The Commission may modify its findings as to the facts or make new findings by reason of additional evidence, which if supported by the evidence, shall be conclusive as to the facts except that within such time and in such manner an appeal may be taken as aforesaid upon a question or questions of law only."

The matter here has only reached the stage that the court has determined it has jurisdiction, but has not passed upon any of the questions attempted to be raised by the assignments of error filed by the appellants in that court.

Under the provisions above quoted, if the Court of Customs Appeals, when this matter finally goes before it for determination, finds error of law, it must remand the findings of the Tariff Commission to that body directing the taking of additional testimony on the modification of its findings and such an order of the Court of Customs Appeals would be an interlocutory order in the matter and could not by any possibility be considered a "final judgment" and hence no appeal therefrom to this Honorable Court could be prosecuted by your petitioners.

If the Tariff Commission thereafter under an opinion of the Court of Customs Appeals should take further testimony and make further findings, which of course might be adverse to the position taken in the findings heretofore made and the recommendations that an embargo be issued, under such circumstances under the peculiar language of Section 316 your petitioner would have no right to appeal to the Court of Customs Appeals and the determination by the Court of Customs Appeals that it had jurisdiction in the prior appeal would stand without the possibility of any review by your Honorable Court upon certiorari.

The judgment order so-called issued by that court is also an interlocutory order being made prior to a final determination of the matters attempted to be brought before the Court of Customs Appeals by the appeal of the importing interests as aforesaid.

If the construction of Section 316 above suggested is correct, no appeal can come before this Honorable Court on your petitioners' application, and the prohibitory writ herein respectfully prayed for is the only method whereby the question of the jurisdiction of the Court of Customs Appeals under the Constitution can be raised.

WHEREFORE your petitioner prays that a rule be made and issued from this Honorable Court directed to the said Presiding Judge and Associate Judges of the United States Court of Customs Appeals to show cause why a writ of prohibition should not issue to prohibit the said Presiding Judge and Associate Judges from entertaining the appeal from the findings and recommendations of the Tariff Commission aforesaid and to cancel and annul the so-called judgment order of that court wherein the motion to dismiss the appeal is denied.

ALBERT MACC. BARNES, JR.,
Attorney for Petitioner.

I have read the foregoing petition by me subscribed and the facts therein stated are true to the best of my information and belief.

ALBERT MacC. BARNES, Jr.

Subscribed and sworn to before me,
this 2[illegible]th day of August, 1928.

Ethel G. Meares,
Notary Public,
(Seal) Bronx County.
Bronx Co. Clerk's No. 41, Register's No. 2992.
Certificate filed in New York Co.
Clerk's No. 267, Register's No. 9231.
Commission expires March 30, 1929.

BRIEF IN SUPPORT OF PETITION

Opinion of the Court Below

The only opinion in this case is that of the United States Court of Customs Appeals, reported in 16 Ct. Cust. Appls. , 53 Treasury Decisions , T. D. 42827.

Jurisdiction

The jurisdiction of this court to entertain the petition for a writ of prohibition is invoked under the inherent power of this court to grant such remedy in cases where a denial of it would leave the petitioner without any remedy to test the jurisdiction of the court below. *Ex Parte Oklahoma*, 220 U. S. 191, 55 L. Ed. 431; *Ex Parte United States*, 226 U. S. 420, 57 L. Ed. 281.

Statement

The appellants in the proceedings entitled "Frischer & Co. v. Bakelite Corporation, et al., Suit No. 3009," have appealed to the United States Court of Customs Appeals to review the findings of the United States Tariff Commission in a proceeding initiated before that body by the Bakelite Corporation for the purpose of obtaining an embargo against the importation of certain articles of Synthetic Phenolic Resin claimed to be imported into the United States in contravention of the rights of the Bakelite Corporation. The proceeding before the United States Tariff Commission was instituted under Section 316 of the Tariff Act of 1922 and the appeal to the Court of Customs Appeals if any, is based upon the rights therein given to an importer to review the findings of the Tariff Commission.

The Bakelite Corporation moved to dismiss such appeal on the ground that Congress had no power to authorize such an appeal to a Federal Court and that motion was denied by the United States Court of Customs Appeals and in effect thereby that court assumed jurisdiction of the appeal.

A writ of prohibition is requested here because it is felt that otherwise the assumption of jurisdiction by the Court of Customs Appeals in Suit No. 3009 may not be otherwise brought to the attention of this court. The procedure subsequent to a report by the Tariff Commission to the President outlined in Section 316 of the Tariff Act of 1922 is such that your petitioners here are quite likely to be precluded from any opportunity to review the decision of the United States Court of Customs Appeals. That court having held the appeal, the case will finally be submitted to that court and may under the forms therein provided be remanded to the Tariff Commission.

No right of appeal is granted to your petitioners from the findings of the Tariff Commission and therefore if such finding be adverse on such remand, your petitioner would be precluded from any opportunity of having an Appellate Court pass upon the propriety thereof.

Specification of Errors.

1. The United States Court of Customs Appeals erred in holding that it had jurisdiction to entertain the appeal from the findings of the United States Tariff Commission.

2. The United States Court of Customs Appeals erred in holding that the proceedings instituted before the United States Tariff Commission constituted a case or controversy within the meaning of Article III, Section 2, of the Constitution of the United States.

3. The United States Court of Customs Appeals erred in holding that the fact that the appeal before it consti-

tuted a case or controversy gave it jurisdiction to entertain such appeal.

4. The United States Court of Customs Appeals erred in failing to hold that the provisions of Section 316 of the Tariff Act of 1922 giving a right of appeal from the findings of the United States Tariff Commission are unconstitutional.

Summary of Argument.

The United States Court of Customs Appeals, being one of the courts created by Article III, Section 1, of the Constitution, is confined in its jurisdiction to such cases or controversies as are specified in Section 2 of the Article. The proceedings instituted in the United States Tariff Commission constituted neither a case nor a controversy within the meaning of the section, and the United States Court of Customs Appeals therefore had no jurisdiction to entertain an appeal from the findings of the Commission. That portion of Section 316 of the Tariff Act of 1922 purporting to give the right to such appeal is unconstitutional.

ARGUMENT.

POINT I.

The jurisdiction of the Supreme Court of the United States and the inferior Federal Courts is limited to cases or controversies and no appeal will lie to a Federal Court except from a judgment which finally determines a controversy.

Any finding of the United States Tariff Commission under the provisions of Section 316 of the Tariff Act of

1922 can be considered as nothing but a finding of fact upon which The President of the United States may determine whether or not unfair methods of competition and unfair acts in the importation of merchandise are found to exist.

No provision is made for the issuance of a judgment by the Tariff Commission and standing by themselves, such findings have absolutely no vitality. No order based thereon has been issued by The President of the United States.

This court has lately passed upon a case which your petitioners deem to be conclusive of the question of the jurisdiction of the inferior courts of the United States under Article III, Section 2 of the Constitution.

See *Postum Cereal Company, Inc.* v *California Fig Nut Company*, 272 U. S. 693, 71 L. Ed. 478. That was a case involving the registration of a trade-mark wherein finally the Commissioner of Patents on an appeal from the Examiner of Interferences in the Patent Office held that the registration of a trade-mark should not be cancelled.

Thereupon an appeal was taken to the Court of Appeals of the District of Columbia which court held that there was no jurisdiction given to that court to hear such appeals and the same was accordingly dismissed. The Court of Appeals of the District of Columbia thereupon allowed an appeal to the Supreme Court of the United States on their judgment dismissing the appeal. The appellant based his appeal upon the fact that any final judgment of the Court of Appeals might be re-examined in the Supreme Court upon error or appeal in cases in which the construction of any law of the United States is drawn in question. The Supreme Court however, refused to entertain the question at all upon the ground that there was no jurisdiction in that court to entertain the same upon the ground that the judgment of the District Court of Appeals was not a judicial judgment.

The Learned Chief Justice writing the opinion says:

"The decision of the Court of Appeals under Section 9 of the Act of 1905 is not a judicial judgment. It is a mere administrative decision. It is merely an instruction to the Commissioner of Patents by a court which is made part of the machinery of the Patent Office for administrative purposes. In the exercise of such function it does not enter a judgment binding parties in a case as the term 'case' is used in the third article of the Constitution. Section 9 of the Trade-Mark Act of 1905, applies to the appeal, taken under it the same rules which under Sec. 4914, Rev. Stat. Comp. Stat. Sec. 9459, 7 Fed. Stat. Anno. 2nd Ed. P. 202, apply to an appeal taken from the decision of the Commissioner of Patents in patent proceedings. Butterworth v. United States, 112 U. S. 50, 60; 28 L. Ed. 656, 659; 5 Sup. Ct. Rep. 25; Gaines v. Knecht, 27 App. D. C. 530, 532; E. C. Atkins & Co. v. Moore, 212 U. S. 285, 291; 53 L. Ed. 515, 517; 29 Sup. Ct. Rep. 390. Neither the opinion nor decision of the Court of Appeals under Sec. 4914, Rev. Stat. or Sec. 9 of the Act of 1920, precludes any person interested from having the right to contest the validity of such patent or trade-mark in any court where it may be called in question. This result prevents an appeal to this court which can only review judicial judgments. This court has so decided in Frasch v. Moore, 211 U. S. 1; 53 L. Ed. 65; 29 Sup. Ct. Rep. 6, in an appeal as to patent proceedings, and in E. C. Atkins & Co. v. Moore, 212 U. S. 285; 53 L. Ed. 515; 29 Sup. Ct. Rep. 390, as to appeals in trade-mark proceedings. This was the ratio dicidendi of Baldwin Co. v. R. S. Howard Co., 256 U. S. 35; 65 L. Ed. 816; 41 Sup. Ct. Rep. 405, already referred to, where both appeal and certiorari were denied in a similar trade-mark proceeding."

Further discussing the jurisdiction of the Supreme Court in a constitutional sense and administrative decisions of the courts of the District of Columbia (which latter jurisdiction Congress has power to confer), the court says:

"The distinction between the jurisdiction of this court which is confined to the hearing and decision of cases in the constitutional sense and that of administrative action and decision, power for which may be conferred upon courts of the District is shown in the case of Keller v. Potomac Electric Power Co., 261 U. S. 428, 440, 442, 443; 67 L. Ed. 731, 735, 736; 43 Sup. Ct. Rep. 445. There it is pointed out that while Congress in its constitutional exercise of exclusive legislation over the district may clothe the courts of the district not only with the jurisdiction and powers of the Federal Courts in the several states, but also with such authority as a state might confer on her courts, Prentis v. Atlantic Coast Line Co., 211 U. S. 210, 225, 226; 53 L. Ed. 150, 158, 159; 29 Sup. Ct. Rep. 67, and so may vest courts of the district with administrative or legislative functions which are not properly judicial, *it may not do so with this court or any federal court established under Article 3 of the Constitution.* Of the jurisdiction of this court, we said at page 444:

'Such legislative or administrative jurisdiction, it is well settled, can not be conferred on this court either directly or by appeal. The latest and fullest authority upon this point is to be found in the opinion of Mr. Justice Day, speaking for the court in Muskrat v. United States, 219 U. S. 346; 55 L. Ed. 246; 31 Sup. Ct. Rep. 250. The principle there recognized and enforced on reason and authority is that the jurisdiction of this court and *of the inferior courts of the United States,* ordained and established by Congress under and by virtue of the third article of the Constitution is limited to cases and controversies in such form that the judicial power is capable of acting on them; and does not extend to an issue of constitutional law framed by Congress for the purpose of invoking the advice of this court without real parties or a real case, or to administrative or legislative issues or controversies.' See also Liberty Warehouse Co. v. Grannis, 273 U. S. 70, post 541; 47 Sup. Ct. Rep. 282.

With this limitation upon our powers, it is not difficult to reach a conclusion in the present case. We should have had no power to review the action of the

District Court if it had heard the appeal and taken administrative jurisdiction and by the same token have now no power to review its action in refusing such jurisdiction." (Italics ours.)

The court refers further to its decision in *Liberty Warehouse Company* v. *Grannis,* 273 U. S. 70; 71 L. Ed. 541, where the court said:

> "The question whether the District Court has jurisdiction to entertain such a petition for a declaration of rights admits of but one answer under the prior decisions of this court.
>
> We need not review these at length. It suffices to say that in the light of the decisions in Muskrat v. United States, 219 U. S. 346, 357; 55 L. Ed. 246, 250; 31 Sup. Ct. Rep. 250; Fairchild v. Hughes, 258 U. S. 126, 129; 66 L. Ed. 499, 504; 42 Sup. Ct. Rep. 274; Texas v. Interstate Commerce Commission, 258 U. S. 158, 162; 66 L. Ed. 531, 537; 42 Sup. Ct. Rep. 261; Keller v. Potomac Electric Co., 261 U. S. 428, 444; 67 L. Ed. 731, 736; 43 Sup. Ct. Rep. 445; Massachusetts v. Mellon, 262 U. S. 447, 488; 67 L. Ed. 1078, 1085; 43 Sup. Ct. Rep. 597; New Jersey v. Sargent, 269 U. S. 328, 330; 70 L. Ed. 289, 291; 46 Sup. Ct. Rep. 122; and Postum Cereal Co. v. California Fig Nut Co., 272 U. S. 693, ante, 478; 47 Sup. Ct. Rep. 284, in which the principles stated in earlier cases are considered and applied—it is not open to question that the judicial power vested by Article 3 of the Constitution in this court and the inferior courts of the United States established by Congress thereunder, extends only to 'cases' and 'controversies' in which the claims of litigants are brought before them for determination by such regular proceedings as are established for the protection and enforcement of rights, or the prevention, redress, or punishment of wrongs; and that their jurisdiction is limited to cases and controversies presented in such form, with adverse litigants, that the judicial power is capable of acting upon them, and pronouncing and carrying into effect a judgment between the parties, and does not extend to the determination of abstract questions or issues framed for

the purpose of invoking the advice of the court without real parties or a real case."

In *David Muskrat* v. *United States*, 219 U. S. 346; 55 L. Ed. 246, Mr. Justice Day goes very fully into the decided cases in reference to the jurisdiction of the Supreme Court and also the inferior Federal Courts established under the Constitution. Thus (p. 249):

> "The subject underwent a complete examination in the case of Gordon v. United States, reported in an appendix to 117 U. S. 697, in which the opinion of Mr. Chief Justice Taney, prepared by him and placed in the hands of the clerk, is published in full. It is said to have been his judicial utterance, and the whole subject of the nature and extent of the judicial power conferred by the Constitution is treated with great learning and fullness. In that case an Act of Congress was held invalid which undertook to confer jurisdiction upon the courts of claims, and thence by appeal to this court, the judgment, however, not to be paid until an appropriation had been estimated therefore by the Secretary of the Treasury; and, as was said by the chief justice, the result was that neither court could enforce its judgment by any process, and whether it was to be paid or not depended on the future action of the Secretary of the Treasury and of Congress. 'The Supreme Court,' says the Chief Justice, 'does not owe its existence or its powers to the legislative department of the government. It is created by the Constitution and represents one of the three great divisions of power in the government of the United States, to each of which the Constitution has assigned its appropriate duties and powers, and made each independent of the other in performing its appropriate functions. The power conferred on this court is exclusively judicial, and it cannot be required or authorized to exercise any other.
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> * * * * * * * * *
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> 'These cardinal principles of free government had not only been long established in England, but also in the United States from the time of their earliest col-

onization, and guided the American people in framing and adopting the present Constitution. And it is the duty of this court to maintain it unimpaired as far as it may have the power. And while it executes firmly all the judicial powers entrusted to it, the court will carefully abstain from exercising any power that is not strictly judicial in its character, and which is not clearly confided to it by the Constitution.'

"At the last term of the court, in the case of Baltimore & O. R. Co. v. Interstate Commerce Commission, 215 U. S. 216, 54 L. Ed. 164, 30 Sup. Ct. Rep. 86, this court declined to take jurisdiction of a case which undertook to extend its appellate power to the consideration of a case in which there was no judgment in the court below. In that case former cases were reviewed by Mr. Chief Justice Fuller, who spoke for the court, and the requirement that this court adhere strictly to the jurisdiction, original and appellate, conferred upon it by the Constitution, was emphasized and enforced. It is therefore apparent that from its earliest history this court has consistently declined to exercise any powers other than those which are strictly judicial in their nature.

"It therefore becomes necessary to inquire what is meant by the judicial power thus conferred by the Constitution upon this court, and, with the aid of appropriate legislation, upon the inferior courts of the United States. 'Judicial power', says Mr. Justice Miller, in his work on the Constitution, 'is the power of a court to decide and pronounce a judgment and carry it into effect between persons and parties who bring a case before it for decision'. Miller, Const. 314.

"As we have already seen, by the express terms of the Constitution, the exercise of the judicial power is limited to 'cases' and 'controversies'. Beyond this it does not extend, and unless it is asserted in a case or controversy within the meaning of the Constitution, the power to exercise it is nowhere conferred.

"What, then, does the Constitution mean in conferring this judicial power with the right to determine 'cases' and 'controversies'. A 'case' was defined by Mr. Chief Justice Marshall as early as the leading case of Mabury v. Madison, 1 Cranch 137, 2 L. Ed. 60, to be a suit instituted according to the regular course of judicial procedure. And what more, if anything, is meant in the use of the term 'controversy'? That question was dealt with by Mr. Justice Field at the circuit, in the case of Re Pacific R. Commission, 32 Fed. 241, 255. Of these terms that learned justice said:

'The judicial article of the Constitution mentions cases and controversies. The term "controversies", if distinguishable at all from "cases", is so in that it is less comprehensive than the latter, and includes only suits of a civil nature. Chisholm v. Georgia, 2 Dall. 431, 432, 1 L. Ed. 445, 446, I Tucker's Bl. Com. App. 420, 421. By cases and controversies are intended the claims of litigants brought before the court for determination by such regular proceedings as are established by law or custom for the protection or enforcement of rights, or the prevention, redress, or punishment of wrongs. Whenever the claim of a party under the Constitution, laws, or treaties of the United States takes such a form that the judicial power is capable of acting upon it, then it has become a case. The term implies the existence of present or possible adverse parties, whose contentions are submitted to the court for adjudication.'"

The purview of the attempted appeal given to importers is enough to show that it does not involve a final decision in a case or controversy. The right is restricted to questions of law only, but the only power of the appellate court as attempted to be given is "if it shall be known to the satisfaction of said court that *further evidence should be taken*, and *that there were reasonable grounds for the failure to adduce such evidence* under proceedings before the Commission, said court may order such additional evidence to be taken before the Commission * * *" (italics ours). No power to affirm, reverse or modify the findings themselves is given to the court, and in fact no authority is given to the court except to remand for further evidence.

Certainly the Supreme Court could not and would not take jurisdiction under such circumstances, and as certainly the Court of Customs Appeals has no power to consider the appeal.

It is also to be noticed that no right of appeal is given to the petitioners from any findings of the United States Tariff Commission. Could a tentative determination from which only one party could even attempt a review be considered a final judgment or order in a case or controversy? The denial or jurisdiction of such an appeal leaves the parties where they ought to be with equal and only equal rights before the Tariff Commission.

POINT II.

The United States Court of Customs Appeals is an inferior United States Court.

Under the above cited cases, it would seem only to be necessary to determine whether the Court of Customs Appeals is a Federal Court.

Article III, Section 1 of the Constitution reads:

> "The judicial power of the United States, shall be vested in one Supreme Court, and in such inferior courts as the Congress may from time to time ordain and establish. The judges, both of the supreme and inferior courts, shall hold their offices during good behavior, and shall, at stated times, receive for their services, a compensation, which shall not be diminished during their continuance in office."

Article III, Section 2, provides:

> "The judicial power shall extend to all cases, in law and equity, arising under this Constitution, the laws of the United States, and treaties made, or which shall be made, under their authority; to all cases affecting ambassadors, other public ministers and consuls; to all cases of admiralty and maritime jurisdiction; to

> controversies to which the United States shall be a party; to controversies between two or more states; between a state and citizens of another state; between citizens of different states; between citizens of the same state claiming lands under grants of different states, and between a state, or the citizens thereof, and foreign states, citizens and subjects."

It is to be noted that in the decision of the Court of Customs Appeals it holds as was asserted by your peitioners and conceded both by the appellants in the Court of Customs Appeals, and the Honorable Charles B. Lawrence, who is the Assistant Attorney General of the United States in charge of Customs Matters, appearing as amicus curiæ at the request of the court, that the United States Court of Customs Appeals is an inferior court of the United States established under Article III of the Constitution.

POINT III.

The question to be determined is not whether the proceedings constitute a "case" or "controversy" in the Court of Customs Appeals, but whether or not the proceedings culminating in the findings of the Tariff Commission constitute a "case" or "controversy."

In its opinion, the Court of Customs Appeals holds itself to have jurisdiction of the matters in question because of the fact that after they have assumed jurisdiction they will enter a judgment which will have the effect of finally settling the "case" or "controversy."

The learned court says: "The question before us is: When the case reaches us is it a 'case' or a 'controversy'? It is not a question as to what it was in the tribunal below, but what it is when it reaches us."

The Court of Customs Appeals was ordained and established by Congress in an act to ratify, revise and amend the laws relating to the judiciary, Chapter 8 of the Judicial Code, Sections 188 to 199 inclusive, 36 Stat. L. 1143-1146. Section 194 provides that the court shall be a court of record, Section 195 was amended by the Act of August 22, 1914. It reads:

> "Sec. 195. (FINAL DECISIONS OF BOARD OF GENERAL APPRAISERS TO BE REVIEWED ONLY BY CUSTOMS COURT OF APPEALS. FINALITY OF DECISIONS OF CUSTOMS COURT.)
>
> That the Court of Customs Appeals established by this chapter shall exercise exclusive appellate jurisdiction to review by appeal, as herein provided, final decisions by a board of general appraisers in all cases as to the construction of the law and the facts respecting the classification of merchandise and the rate of duty imposed thereon under such classifications, and the fees and charges connected therewith, and all appealable questions as to the jurisdiction of said board, and all appealable questions as to the laws and regulations governing the collection of the customs revenues; and the judgments and decrees of said Court of Customs Appeals shall be final in all such cases. Provided * * *."

It will be noted that the jurisdiction of the Court of Customs Appeals is distinctly limited to that of an appellate court. Nothing in the statute gives to that court either expressly or by necessary implication any original jurisdiction.

As such therefore, it is limited to appeals in cases or controversies which have become such prior to the time that they reach that court.

Having no original jurisdiction it cannot start a case or controversy. A case or controversy must have originated in some other judicial tribunal and a judgment issued therein in order that the Court of Customs Appeals may assume jurisdiction thereof.

This is clearly stated in *Baltimore & Ohio* v. *Interstate Commerce Commission*, 215 U. S. 216, 54 L. Ed. 164, 30

Sup. Ct. Rep. 86, in which Mr. Chief Justice Fuller in passing upon a case where a review by certificate was asked of a question raised in the Circuit Courts held that the Supreme Court had no power to pass upon the question raised in the absence of a final judgment. The court says:

> "Ordinarily in the Federal Courts, in the absence of express statutory authority, no appeal can be taken or writ of error brought *except from a final decree or to a final judgment.* McLish v. Roff, 141 U. S., 661, 665, 35 L. Ed. 893, 894, 12 Sup. Ct. Rep. 118; Forgay v. Conrad, 6 How. 201, 205, 12 L. Ed. 404, 406. There is no final judgment or decree in this case, nor any judicial determination from which an appeal would lie. The Alicia, 7 Wall. 571, 19 L. Ed. 84, is in point. In that case it appeared that, on the 9th day of January, 1863, a decree of condemnation had been entered in the District Court against the Alicia and her cargo for violation of the blockade. From this decree an appeal was allowed and taken to the Circuit Court; and on the 18th of May, 1867, an order was made in that court on the application of the parties in interest—there being at this time, in the Circuit Court, no order, judgment, or decree in the case—for the transfer of the cause to this court under the 13th section of the act of June 30, 1864 (13 Stat. at L. 311, chap. 174), which enacted that prize causes depending in the Circuit Court might be so transferred. This court held that the cause was removed to the Circuit Court by the appeal from the decree of the District Court, and that that decree was vacated by the appeal, and that the Circuit Court acquired full jurisdiction of the cause, and was fully authorized to proceed to final hearing and decree. And Chief Justice Chase said: 'Nor can it be doubted that, under the Constitution, this court can exercise, in prize causes, appellate jurisdiction only. *An appellate jurisdiction necessarily implies some judicial determination—some judgment, decree, or order of an inferior tribunal, from which an appeal has been taken.* But in this case there had been no such order, judgment, or decree in the Circuit Court; and there was no subsisting decree in the District

> Court, from which an appeal could be taken. We are obliged to conclude that, in the provision for transfer, an attempt was inadvertently made to give to this court a jurisdiction withheld by the Constitution, and, consequently, that the order of transfer was without effect. The cause is still pending in the Circuit Court." (Italics ours.)

The United States Court of Customs Appeals in its opinion refers to several cases which were held to constitute cases or controversies within the meaning of the constitutional provision. It is to be noted, however, that each of these cases were initiated in a court of original jurisdiction.

Thus in *Tutun v. United States,* 270 U. S. 568, 70 L. Ed. 738 the question involved was as to whether or not *an order of a District Court* granting or denying a petition for naturalization was a final decision and whether or not such a proceeding was a "case" within the meaning of Article III of the Constitution. Properly to consider this case in relation to the case now under consideration, a comparison must be made between the judgment of the District Court granting or denying a petition for naturalization and the findings of the Tariff Commission thereafter to be referred to the President under Section 316 of the Tariff Act of 1922. The mere statement of the situation in each of these cases is sufficient to show that the decision in the Tutun case is no authority for holding that the Court of Customs Appeals has jurisdiction to entertain the appeal here.

In *Tutun v. United States, supra,* this court stated that "the United States may create rights in individuals against itself and provide only an administrative remedy. It may provide a legal remedy but make resort to the courts valuable only after all administrative remedies have been exhausted. Whenever the law provides a remedy enforceable in the courts according to the regular course of legal procedure and that remedy is pursued, there arise a case within the meaning of the Constitution, whether the subject of the litigation be property or statutes." The proceedings before the United States Tariff Commission under Section 316 of the Tariff Act of 1922 are purely administrative. They are designated as investigations to assist the President in making decisions. In Sections 316, there is no obligation placed upon the President to follow any findings of the Tariff Commission. Their findings do not become binding on any one nor are they in any sense a final judgment or decree because that function of rendering the final judgment or decree is left to the President.

This is totally different from the situation arising in the case of a decree by a District Court granting a petition for citizenship.

The Tariff Commission is not a judicial tribunal. If the matter here in question had arisen in any form before a judicial tribunal of the United States from which appeals are properly prosecuted to the Court of Customs Appeals, the decision of the court in the Tuton case would have been applicable to the situation here.

The findings of fact and the recommendations of the Tariff Commission to the President are advisory only and as was stated by this court in *Fidelity National Bank & Trust Company* v. *Swope*, 274 U. S. 123, 71 L. Ed. 959, the application of such an advisory function does not make of the matter a case or controversy under the Constitution, citing *Tregea* v. *Modesto Irrigation District*, 164 U. S. 179; 41 L. Ed. 395; 17 Sup. Ct. Rep. 52, and *Liberty Warehouse Company* v. *Grannis*, 273 U. S. 70; 47 Sup. Ct. Rep. 282. The case of Fidelity National Bank & Trust Company v. Swope, rests on a basis entirely different from that in the present proceeding. It was there held that the judicial power "operates to determine judicially the legal limits of the benefit district and to define rights of the parties in lands specifically described in the pleadings." There is no attempt on the part of the Tariff Commission nor has it any authority to judicially determine any question. Its power is limited to findings of fact and recommendations to the President upon which no final decision or decree or proclamation or judgment may ever be rendered. It is purely advisory in nature and even the attempt to create a right of appeal to the United States Court of Customs Appeals is nothing more than an attempt on the part of the legislative department to force on a Federal Court the function of advising an administrative body so that it in turn may advise the executive.

The Court of Customs Appeals in its opinion states: "The parties have had their day in court where a definite legal issue involving a valuable right is finally and judicially adjudicated." Certainly at this time this quotation is entirely inapplicable to the situation here. The parties have had no day in court because at the present time no court proceedings of any nature except under the assumed jurisdiction of the Court of Customs Appeals have been had. To state that a person has had a day in court because they are granted a questionable right of appeal from a finding made by a purely administrative body refutes itself.

In all of the cases cited by the learned court in its opinion, the cases had initiated in a court having original and not appellate jurisdiction.

In *Interstate Commerce Commission* v. *W. G. Brinson*, 154 U. S. 447, 38 L. Ed. 1047, the matter involved was the review of a judgment dismissing a petition filed in the Circuit Court of the United States by the Interstate Commerce Commission under the provisions of the Act of Congress entitled "An act to regulate commerce." The Supreme Court held, reversing the decision of the court below, that there was a case or controversy involved.

This case involved the power of Congress to direct the courts to use their authority in aid of inquiries before the Interstate Commerce Commission. It involved no question of an appeal from a finding of an administrative body like the matter under consideration.

In *Den v. The Hoboken Land & Improvement Co.*, 59 U. S. 272, 15 L. Ed. 372, a question was similarly presented to a court of original jurisdiction and the decision of the Supreme Court held that there was a case or controversy involved. None of these or any of the other cases cited in the learned opinion of the Court of Customs Appeals is an authority for the proposition that a case or controversy can first initiate in a purely appellate court. The difference between cases involving the Federal Trade Commission and the Interstate Commerce Commission and the matter under consideration is apparent. There is no right of appeal granted to any court from the findings of any of the Federal Commissions so far as we are aware.

There are proceedings whereby the original jurisdiction of a Federal Court may be invoked to pass upon the propriety of certain of the orders of such commissions, either where the Government has asked for the aid of the courts in enforcing the orders of the commissions or where the interested parties have asked that said orders be vacated or set aside.

Undoubtedly such matters are cases or controversies within the meaning of Article III of the Constitution and have been so held by this Court, but there the orders of the Commission have a vitality in themselves and it is the enforcement thereof which comes before the Court for determination. Here the findings of the Tariff Commission not only have no vitality but even without any review thereof may never result in action by the Chief Executive.

It is respectfully urged that:

1. The Court of Customs Appeals is an inferior Federal Court established under Article III of the Constitution having exclusively appellate jurisdiction.

2. That there is no case or controversy pending within the meaning of Article III, Section 2, of the Constitution over which such appellate court can assume jurisdiction.

3. That a writ of prohibition should issue as asked for in the petition.

Respectfully submitted,

ALBERT MACC. BARNES, JR.,
Attorney for Petitioner.
Samuel M. Richardson,

EXHIBIT "A".

May 25, 1928.

JURISDICTION OF APPEALS FROM THE U. S. TARIFF COMMISSION—CONSTITUTIONALITY

The United States Court of Customs Appeals

OCTOBER TERM, 1927

In the matter of the investigation of alleged unfair methods of competition and unfair acts in the importation and sale of Synthetic Phenolic Resin, Form C, and articles made wholly or in part thereof.

FRISCHER & CO., INC., RANDES IMPORTING COMPANY, TRANSATLANTIC CLOCK & WATCH COMPANY, INC., WESTERN BRIAR PIPE COMPANY, NATIONAL COUNCIL OF IMPORTERS & TRADERS, INC., APPELLANTS.

Suit No. 3009. Calendar No. 134

BLAND, *Judge*, delivered the opinion of the court:

In the above entitled matter, the Bakelite Corporation, et al., styling themselves "Appellees", moved for an order dismissing the above entitled appeal upon the ground that the court has no jurisdiction to entertain the same.

On the 16th day of December, 1925, the Bakelite Corporation, having its principal place of business in the City of New York, and certain of its subsidiaries and consumers filed a complaint with the United States Tariff Commission, complaining of certain unfair methods of competition and unfair acts tending to injure their business of manufacturing and selling articles composed of synthetic phenolic resin, to which had been given the name "Bakelite" after the name of its alleged inventor, Dr. Leo Bakeland. The complaint proceeded upon the theory that the faceted beads and other articles made of synthetic phenolic resin imported were being imported in violation of certain patent rights, possessed by the Bakelite Corporation. The complaint was made pursuant to the provisions of Section 316, Subdivision (b) of the Tariff Act of September 21, 1922.

The Tariff Commission thereupon made a report to the President that it had investigated the complaint, and made and submitted findings to the effect that there was *prima facie* reason to believe that Section 316 of the Tariff Act in question was being violated, and recommended that the Treasury Department forbid the entry of such articles until such investigation as the President might deem necessary might be completed, and recommended that the President request the Secretary of the Treasury to forbid such entry. Acting upon such report, the President did direct the Secretary of the Treasury to issue an embargo against the commodity.

The Commission thereupon published a notice directing that all persons interested in the proceedings show cause why the prayer for relief sought in the complaint should not be granted.

Frischer & Co., Inc., et al., the respondents, known as appellants in this action, appeared and filed a verified answer denying the complaint, setting up that the Bakelite Corporation did not operate the business efficiently or economically; that the patents upon which they relied were invalid; that there was no infringement of the patents; that the violation of a patent law was not an unfair method of competition, and other claims.

The Bakelite Corporation appeared before the Commission by counsel and lengthy hearings were had, and on the 25th day of May, 1927, the Commission made its findings and recommendations, in which it expressly found that the provisions of the statute were broad enough to invest it with jurisdiction to declare that the infringement of the patent rights was an unfair method within the meaning of the statute. Certain other findings and recommendations were made, not material here.

From these findings and recommendations an appeal was taken to this court under subdivision (c) of Section 316, *supra*, upon thirty-five assignments of error.

Frischer & Co., Inc., et al., at the time of the argument of the motion to dismiss, made what they style a cross-motion to strike out the appearance of Barnes, McKenna & Halstead as attorneys for the Bakelite Corporation, on the ground that the same is unauthorized by statute, which latter motion the court now overrules.

Before setting out the reasons assigned by the Bakelite Corporation, et al., why this court was without jurisdiction to hear the appeal, we deem it proper to set out in full the parts of the Tariff Act of 1922 under which the actions of the Tariff Commission and the appeal to this court were taken:

> Sec. 316. (a) That unfair methods of competition and unfair acts in the importation of articles into the United States, or in their sale by the owner, importer, consignee, or agent of either, the effect or tendency of which is to destroy or substantially injure an industry, efficiently and economically operated, in the United States, or to prevent the establishment of such an industry, or to restrain or monopolize trade and commerce in the United States, are hereby declared unlawful, and when found by the President to exist shall be dealt with, in addition to any other provisions of law, as hereinafter provided.
>
> (b) That to assist the President in making any decisions under this section the United States Tariff

Commission is hereby authorized to investigate any alleged violation hereof on complaint under oath or upon its initiative.

(c) That the commission shall make such investigation under and in accordance with such rules as it may promulgate and give such notice and afford such hearing, and when deemed proper by the commission such rehearing with opportunity to offer evidence, oral or written, as it may deem sufficient for a full presentation of the facts involved in such investigation; that the testimony in every such investigation shall be reduced to writing, and a transcript thereof with the findings and recommendations of the commission shall be the official record of the proceedings and findings in the case, and in any case where the findings in such investigation show a violation of this section, a copy of the findings shall be promptly mailed or delivered to the importer or consignee of such articles; that such findings, if supported by evidence, shall be conclusive, except that a rehearing may be granted by the commission, and except that, within such time after said findings are made and in such manner as appeals may be taken from decisions of the United States Board of General Appraisers, an appeal may be taken from said findings upon a question or questions of law only to the United States Court of Customs Appeals by the importer or consignee of such articles; that if it shall be shown to the satisfaction of said court that further evidence should be taken, and that there were reasonable grounds for the failure to adduce such evidence in the proceedings before the commission, said court may order such additional evidence to be taken before the commission in such manner and upon such terms and conditions as to the court may seem proper; that the commission may modify its findings as to the facts or make new findings by reason of additional evidence, which, if supported by the evidence, shall be conclusive as to the facts except that within such time and in such manner an appeal may be taken as aforesaid upon a question or questions of law only; that the judgment of said court shall be final, except that the same shall be subject to review by the United States Supreme Court upon certiorari applied for within three months after such judgment of the United States Court of Customs Appeals.

(d) That the final findings of the commission shall be transmitted with the record to the President.

(e) That whenever the existence of any such unfair method or act shall be established to the satisfaction of the President he shall determine the rate of additional duty, not exceeding 50 nor less than 10 per centum of the value of such articles as defined in Section 402 of Title IV of this Act, which will offset such method or act, and which is hereby imposed upon articles imported in violation of this Act, or, in what he shall be satisfied and find are extreme cases of unfair methods or acts as aforesaid, he shall direct that such articles as he shall deem the interests of the United States shall require, imported by any person violating the provisions of this Act, shall be excluded from entry into the United States, and upon information of such action by the President, the Secretary of the Treasury shall, through the proper officers, assess such additional duties or refuse such entry; and that the decision of the President shall be conclusive.

(f) That whenever the President has reason to believe that any article is offered or sought to be offered for entry into the United States in violation of this section but has not information sufficient to satisfy him thereof, the Secretary of the Treasury shall, upon his request in writing, forbid entry thereof until such investigation as the President may deem necessary shall be completed: *Provided*, That the Secretary of the Treasury may permit entry under bond upon such conditions and penalties as he may deem adequate.

(g) That any additional duty or any refusal of entry under this section shall continue in effect until the President shall find and instruct the Secretary of the Treasury that the conditions which led to the assessment of such additional duty or refusal of entry no longer exist.

Briefly stated, the position of the Bakelite Corporation, et al., is that the matter before the court now is not a "case" or a "controversy" within the meaning of Section 2 of Article III of the Constitution of the United States and that the United States Court of Customs Appeals, being an inferior court, created by Congress, under and by virtue of the authority of Section 1 of Article III of the Constitution, can only hear "cases" and "controversies" such as are provided for in said Section 2.

The pertinent portions of the Constitution in the determination of the question before us are as follows:

ARTICLE III.

> Section 1. The judicial Power of the United States, shall be vested in one supreme Court, and in such inferior Courts as the Congress may from time to time ordain and establish. The Judges, both of the supreme and inferior Courts, shall hold their Offices during good Behaviour, and shall, at stated Times, receive for their Services, a Compensation, which shall not be diminished during their Continuance in Office.
>
> Section 2. The judicial Power shall extend to all Cases, in Law and Equity, arising under this Constitution, the Laws of the United States, and Treaties made, or which shall be made, under their Authority;—to all Cases affecting Ambassadors, other public Ministers and Consuls;—to all Cases of admiralty and maritime Jurisdiction;—to Controversies to which the United States shall be a Party;—to Controversies between two or more States;—between a State and Citizens of another State;—between Citizens of different States,—between Citizens of the same State claiming Lands under Grants of different States, and between a State, or the Citizens thereof, and foreign States, Citizens or Subjects.

* * * * * * * * *

ARTICLE 1.

> "Section 8. The Congress shall have Power * * *

* * * * * * * * *

> "To constitute Tribunals inferior to the supreme Court;

* * * * * * * * *

Both sides to the controversy, including *amicus curiae*, concede that the United States Court of Customs Appeals is an inferior court, created under and by virtue of the provisions of said Article III of the Constitution, and that the jurisdiction of this court is limited to the consideration of such "cases" and "controversies" as are provided for in Section 2 of said article. The difference of opinion between the parties seems to be entirely confined to the question as to whether the matter before us is or is not such a "case" or "controversy."

It is at once apparent that if this court is not limited in its jurisdiction to the class of "cases" and "controversies" referred to in Article III, then there is no reason why it may not properly consider administrative appeals or appeals involving almost any kind of disputed question, when so directed by Congress. We think it proper, therefore, to attempt to definitely determine under what constitutional grant of power Congress was acting when it created this court, before proceeding to the determination of the question as to whether the appeal to this court submits to it for decision such a "case" or "controversy."

When Congress creates a court, obviously, it must do so by virtue of some powers conferred upon it by the Constitution. We think Article 1, section 8, where it provides that "the Congress shall have power * * * to constitute Tribunals inferior to the supreme Court," grants no further court-creating powers than those provided for in Article III. See Story on the *Constitution*, 5th Ed. Vol. 2, Sec. 1579; and Walker's *American Law*, 6th Ed., p. 108; and Watson on the *Constitution*, Vol. 2, p. 1065.

It may be argued that Congress has the power to create certain courts or judicial tribunals by virtue of certain implied grants of the Constitution aside from any powers expressly conferred by Article III; that is to say, that the right to establish complete claims-settling machinery, including that of a judicial tribunal, goes with the grant of the right expressly granted to pay debts, and that in the same manner Congress has the implied power to create an appellate judicial tribunal to adjudicate matters arising out of the collection of income taxes and out of the collection of customs duties, etc. Regardless of what may be said and what has been said about the lack of implied powers where the Constitution speaks definitely in granting powers, and the lack of power in Congress to confer any part of the judicial powers of the United States upon any tribunal other than an inferior court, we do not regard it as necessary to the decision of this issue to pass upon the merit or lack of merit of such contentions. See *American Insurance Co.* v. *Canter*, 1 Pet. 511-545.

As we view it, this court either was or was not created, on August 5, 1909, under and by virtue of the power granted to Congress in Article I, section 8, and Article III, *supra*. If it was created under and by virtue of such power, we think it follows, beyond plausible controversy, that it is limited in its jurisdiction to such "cases" and "controversies" as are specified in section 2 of Article III. To this effect are the latest and most apt pronouncements of the Supreme Court and which may be found in *Muskrat* v. *United States*, 219 U. S. 346; *Postum Cereal Company* v. *California Fig Nut Company*, 272 U. S. 693; and *Liberty Warehouse Company et al.* v. *Grannis*, 273 U. S. 70.

While there has been considerable said in some of the decisions of the Supreme Court, in connection with matters somewhat unrelated to the issues at hand, relative to a distinction existing between the limitation on the jurisdiction of the Supreme Court under Article III and the limiting effect of such article on the jurisdiction of inferior courts (*Gordon* v. *United States*, 117 U. S. 697) and while suggestions have been made indicating that there may be "inferior" courts other than those in contemplation in Article III, we think that the decisions of the Supreme Court have definitely settled the proposition that the limitations of Article III on jurisdiction, as well as the provisions for salary and tenure of office, apply with as much force to an inferior court, created under Article III, as to the Supreme Court. *Liberty Warehouse Company et al.* v. *Grannis, supra; Keller et al.* v. *Potomac Electric Power Co. et al.*, 261 U. S. 428.

In order to determine its jurisdiction, therefore, any United States court called upon to construe the laws of the United States, such as the one at bar, must necessarily first determine under what constitutional power it was created, in order to determine whether or not it is subject to the limitations as to jurisdiction prescribed by the Constitution. In this connection the Court must inquire what *was* done, and not what *may be* done. In doing so resort may be had, not only to the context of the act of creation, but to the legislative history, committee reports, and other similar legislation involving the creation of courts and tribunals. After a careful examination into all of these facts, many considerations bring us to the conclusion that this court was created under and by virtue of the authority of Article III of the Constitution, and by no other authority, and some of which considerations we deem it advisable to enumerate.

The pertinent portions of section 29 of the tariff act of 1909 (H. R. 1438), in which act this court was brought into existence, are too long for quotation here. The act itself is referred to, hereinafter, in preference to the Codes of 1911 and 1926, since the Codes have slightly changed some of the original expressions.

It will be observed that in the creation and establishment of this court no jurisdiction was given to it except in "cases". In its original creation it was not within the contemplation of its creators to confer upon it jurisdiction to try administrative questions or matters not embraced within the terms of section 2 of Article III. Every case given to it *arises* under "the laws of the United States".

It will be noted further that it was styled the "United States Court of Customs Appeals," and that its members were designated as "a presiding judge and four associate judges"; that it should be "a court of record, with jurisdiction as hereinafter established and limited"; that its "judgment or decrees * * * shall be final".

Its jurisdiction was carved out of the jurisdiction of the circuit courts and circuit courts of appeals, and it not only took the jurisdiction formerly entertained solely by the circuit courts and circuit courts of appeals, but its jurisdiction was made final, even denying litigants the right of appeal to the Supreme Court. The law was, in 1914, amended to provide a very limited right of appeal to the Supreme Court. The judges were to receive compensation of $10,000. The act provided that upon the temporary inability or disqualification of one or two judges of said court, that the President of the United States might designate any qualified United States circuit or district judge or judges to act in his or their place. It is furthermore to be observed that its jurisdiction was exclusively appellate, and that it was authorized not only to sit in Washington, but also to sit anywhere in the United States, "in the several judicial circuits."

In determining whether a court is an inferior court created under and subject to the provisions of Article III of the Constitution, the Supreme Court has given almost controlling influence to the tenure of office of the judges which was either given by or omitted from the act creating the court. *McAllister* v. *United States*, 141 U. S. 174, 184-186.

The imperative need of life tenure for the judges of the United States Court of Customs Appeals, the jurisdiction of which is co-extensive with the nation and which decides cases which are ofttimes directly concerned with great public issues and issues of vast financial and economic importance, need not be discussed here further than to say that at least equally important reasons exist for a judge of this court to be "perfectly and completely independent, with nothing to influence or control him but God and his conscience" as were under consideration in *Evans* v. *Gore,* 253 U. S. 245. See remarks by Chief Justice Marshall, *Debates Va. Conv.,* 1829-1831, pp. 616, 619; Alexander Hamilton in *Federalist,* No. 79.

An examination of the legislative procedure incident to the enactment, by Congress, of Section 29 of H. R. 1438, being what is commonly known as the "Payne-Aldrich Tariff Act," in July, 1909, the debates in the Senate on July 7, 1909, the Senate committee report, and other relevant legislative matters we think indisputably shows that the framers of the law thought they were, and in fact were, creating a court whose judges would have a *life tenure in office.* The committee report sets up that one of the reasons for creating the court was that if able men devoted a lifetime to the service, they would become highly efficient in the highly technical jurisprudence incident to the settlement of customs controversies. The judges of such court were commissioned for life. *Nowhere in the statute creating this court, or in any other law, is life tenure or service during good behavior of its judges expressly granted,* nor is any definite tenure granted.

From what source, may we inquire, were the judges of this court given tenure during good behavior? There can be but one answer. Being an inferior court, created under Section 1 of Article III of the Constitution, and, as such, exercising a portion of the judicial powers of the United States, said section, by its express terms, authorized said judges to "hold their offices during good behavior." *McAllister* v. *United States, supra.* The two clauses in Section 1 of Article III—diminution of salary and life tenure—are coupled together in "place" and "purpose." *Evans* v. *Gore, supra.* It seems axiomatic that if the tenure of office and compensation provisions of Article III apply to a court created under the article, that by the same token the limitations and prescriptions as to jurisdiction shall also apply. This conclusion seems irresistible.

Following this reasoning, it ensues that if the United States Court of Customs Appeals was not created under the authority of Article III and, therefore, not subject to and limited by the provisions of the article, that there was no tenure of existence given to its judges by legislative act, nor extended to them by the Constitution, and it would be a mere administrative tribunal created under some indefinite powers of Congress, to be recreated, if its existence is deemed essential, at the beginning of each succeeding term of Congress, and its judges would be subjected to the very things the framers of the Constitution, in providing for inferior courts with similar jurisdiction, sought to provide against. See Wilson's *Constitutional Government in the United States*, pp. 17, 142.

Here it might be well to say that the legislative proceedings in connection with the establishment of this court disclose that the section of the act creating this court was not passed by the Congress without a decided division of sentiment. See proceedings in the United States Senate and the Senate Finance Committee Report found on page 4320 of Vol. 44 of the Congressional Record of the 61st Congress, 1st Session, July 7, 1909.

The force of the contention that the judges of the United States Court of Customs Appeals have life tenure by virtue only of Article III of the Constitution is strengthened by the consideration of the fact that in the creation of the United States Circuit Court of Appeals and the United States District Courts, the judges also were given no definite tenure of office. See U. S. Stat. at Large, Vol. 26, p. 826, and R. S. (1878), Sec. 551, p. 93. Congress obviously relied upon the fact that Article III of the Constitution extended this tenure to them. As far as we know, it never has been contended anywhere that circuit courts of appeals and United States district courts were created under any other authority than Article III of the United States Constitution.

It is interesting to note, in this connection, that the Court of Claims was originally created to consider matters which were not "cases" and "controversies," and that its jurisdiction was advisory and ancillary only. *United States* v. *Klein*, 13 Wall. 128, 144; *In re Sanborn*, 148 U. S. 222; *Gordon* v. *United States, supra.* The Supreme Court of the District of Columbia and the Court of Appeals of the District of Columbia were expressly given a tenure during good behavior, by the statute which created them. See act of March 3, 1863, 12 Stat. at Large, 762, and act of February 9, 1893, 27 Stat. at Large, 434.

In *McAllister* v. *United States, supra,* the giving or withholding express tenure of office to a judge in creating a court by Congress was regarded as of controlling effect in determining the character of the court. In that case a territorial judge, for the Territory of Alaska, was removed from office by President Cleveland, under the authority of a statute of Congress, before the expiration of the judge's term of office.

It was contended that the President had no authority and that Congress could give him no authority to remove a judge except in the constitutional manner. The Supreme Court held that he was a territorial or legislative judge, and not a constitutional judge, and in the course of reaching this conclusion, the Court said:

> For the reasons we have stated it must be assumed that the words "judges of the courts of the United States," in section 1768, were used with reference to the recognized distinction between courts of the United States and merely territorial or legislative courts.
>
> This view, it is contended, is not supported by the history of Congressional legislation relating to the organization of courts in the Territories. We do not assent to this proposition. The acts providing for

> courts in the Territories of Orleans, Iowa, Minnesota, New Mexico, Utah, Colorado, Nevada, Dakota and Arizona, fixed the tenure of office for judges in those Territories, respectively, at four years. Those providing for courts in the Territories of Missouri, Arkansas, Florida, Oregon, Washington, Nebraska, Kansas, Idaho, Montana, Wyoming and Oklahoma fixed the tenure of judges at four years, with the addition, in some cases, of the words, "unless sooner removed"; in others, of the words, "unless sooner removed by the President", or, "and no longer," or "and until their successors shall be appointed and qualified," or "unless sooner removed by the President with the consent of the Senate." Of course, Congress would not have assumed, in the acts providing for courts in the Territories named, to limit the terms of the judges, in the modes indicated, *if it had supposed that such courts were courts of the United States of the class defined in the first section of article three of the Constitution, the judges of which hold, beyond the power of Congress to provide otherwise, during good behavior.* Nor is the view that courts in the Territories are legislative courts, as distinguished from courts of the United States, weakened by the circumstances that Congress, in a few of the acts providing for territorial courts, fixed the terms of the office of the judges of those courts during "good behavior." As the courts of the Territories were not courts the judges of which were entitled, by virtue of the Constitution, to hold their offices during good behavior, it was competent for Congress to prescribe the tenure of good behavior, as in the acts last referred to, or to prescribe, as in the other acts above referred to, the tenure of four years and no longer, or four years unless sooner removed, or four years unless sooner removed by the President, or four years unless sooner removed by the President with the consent of the Senate, or four years and until a successor was appointed and qualified. (Italics ours.)

The last above cited case and this line of reasoning would seem to afford complete authority for the conclusion that in creating the Court of Claims and in providing for it a jurisdiction which did not measure up to the requirements of Article III, Congress did not contemplate that its judges would have a life tenure by virtue of Article III, and that, since life tenure for its judges was desired, it was necessary to expressly grant it in the act. It follows that the express grant of life tenure in this and other creative acts was not an unintentional or unnecessary provision, but was an essential one, if life tenure was desired, and that such expression points unmistakably to the kind of courts created and to the source of the power invoked in their creation.

In considering the effect of the various expressions of the Supreme Court of the United States as affecting the issue here under consideration, we have not overlooked the following statement in *Miles* v. *Graham*, 268 U. S. 501.

> * * * It is equally clear, we think, that there is no power to tax a judge of a court of the United States on account of the salary prescribed for him by law.

We have also considered the possible deduction that might be drawn from this statement when considered with the finding of the court in the case of *James* v. *United States*, 202 U. S. 401, or with the reference, by Chief Justice Taft, to "United States Judges" in the great recent case of *Myers* v. *United States*, 272 U. S. 52, 155. We think, however, that the use of the words "a court of the United States", in the *Miles* case, had reference to such an inferior court as comes within the provisions of Article III.

Without citing all the authorities pertinent, we think that Congress may, by appropriate legislation, so change the jurisdiction and powers of a judicial tribunal, which is not an inferior court, as to make it an inferior court, and which court, after such change, will be subject to the limitations of Article III of the Constitution. *United States* v. *Klein*, *supra*, seems to settle this definitely.

The Court of Claims was expressly given a life tenure in the act which created it (sec. 1049, p. 194, R. S., act of

Feb. 24, 1855). For many years the Supreme Court held that the Court of Claims might consider matters which Article III of the Constitution prevented the Supreme Court from considering. *In re Sanborn, Petitioner, supra; Gordon* v. *United States, supra.* Later legislation brought to the Court of Claims a class of cases which the Supreme Court, under its amended rules, regarded as of such character that there was no constitutional inhibition against its considering them on appeal (*De Groot* v. *United States*, 5 Wall. 419; *United States* v. *Klein, supra*), although the judgment of the Court of Claims or the Supreme Court, in such cases, was not subject to "award of execution." Congress could withhold or grant authority to pay. Thus we have an example of a judicial tribunal, obviously created under powers other than those provided for in Article III, being given a class of cases or a status which entitled it to be regarded as an inferior court under Article III (*Miles* v. *Graham, supra,*) and its judgments to be subject to review by the Supreme Court.

While the last cited case does not affirmatively say that the Court of Claims was created under the powers granted to Congress, in Article III of the Constitution, to create inferior courts, it does hold that Article III of the Constitution prevented Congress from diminishing the salary of the judges of the Court of Claims during their continuance in office, which seems to us is, in effect, a holding that the Court of Claims, as now constituted, having the protection of the provisions of Article III, as an inferior court, must necessarily be limited to the jurisdiction prescribed by such article.

In *Evans* v. *Gore, supra*, a judge of a United States district court for the Western District of Kentucky was held to be exempt from paying income tax on his salary by reason of the provision of Article III of the Constitution, which provides that the compensation of the judges "shall not be diminished during their continuance in office." A district court is an inferior court of the United States. Inferior courts are "ordained and established" by Congress, and not by the Constitution. Congress has never expressly given life tenure to the Supreme Court, the district courts or the circuit courts of appeals. There is no reasonable room for contention that the Constitution does not give the judges of such courts life tenure. When Congress created the United States Court of Customs Appeals, it said no more and did no more, in indicating the kind of court it was creating, than it did when it created the circuit courts of appeals and the district courts.

During the entire history of customs jurisprudence litigants in customs cases have always been given, somewhere in the procedure provided by Congress, the opportunity to present the issues before an inferior court created under Article III of the Constitution. When this court was created appeal was provided from the Board of General Appraisers to the United States Court of Customs Appeals, and no further. If this court was not a part of the judiciary created under Article III, Congress, for the first time denied customs litigants the privileges of an inferior court. Whether Congress has the right, under the Constitution, to deny customs litigants the right to submit their cases, of a certain character, to an inferior court we do not undertake to decide. Its doing so would be such a departure from the kind of legislation that it had enacted during a period of a century and a half as to point strongly, we think, to the fact that it did not intend such a result.

We are, therefore, brought to the irresistible conclusion that when Congress enacted the legislation which brought this court into existence it was proceeding under and by virtue of the authority extended to it by Article III of the Constitution and that we are, therefore, required to confine our jurisdiction to "cases" and "controversies" and for the same reasons as apply to other inferior courts and the Supreme Court.

It remains for us to determine whether or not the appeal in the instant case brings to us for review such a "case" or "controversy".

In determining this issue, we recognize that it may be difficult to harmonize the different expressions of the Supreme Court which may be applicable and that some doubt as to the correctness of our conclusion might be entertained. That it is our duty to resolve all reasonable doubts in favor of the validity of the congressional act is so fundamental and so well settled as to require no citation of authority. Equally clear and emphatic is the declared attitude of the Federal judiciary that United States courts will rigidly adhere to the jurisdictional limitations prescribed by the Constitution and will use great care to assert jurisdiction over no matter which, under the terms of the Constitution, is withheld from them. *Muskrat* v. *United States, supra.*

Muskrat v. *United States, supra,* is conceded to be the leading case on the question of what is or is not a "case" or "controversy". There Mr. Justice Day, after reviewing practically all the then existing authorities, quoted approvingly from Mr. Justice Field, of the Circuit Court, in the case of *In re Pacific Railway Commission,* 32 Fed. Rep. 241, 255, and adopted it as the language of the court as to the meaning and application of the term "cases" and "controversies". He quoted the following:

> The judicial article of the Constitution mentions cases and controversies. The term "controversies", if distinguishable at all from "cases", is so in that it is less comprehensive than the latter, and includes only suits of a civil nature. *Chisholm* v. *Georgia,* 2 Dall. 431, 432; 1 Tuck. Bl. Com. App. 420, 421. By cases and controversies are intended the claims of litigants brought before the courts for determination by such regular proceedings as are established by law or custom for the protection or enforcement of rights, or the prevention, redress, or punishment of wrongs. Whenever the claim of a party under the Constitution,

> laws, or treaties of the United States takes such a form that the judicial power is capable of acting upon it, then it has become a case. The term implies the existence of present or possible adverse parties whose contentions are submitted to the court for adjudication.

In applying the *Muskrat* case to the facts in hand, we must not overlook the proposition that in that case the Supreme Court was called upon to review a decision by the Court of Claims predicated upon an act by Congress, which merely provided for the court passing upon the abstract question of whether or not a congressional enactment was valid under the Constitution, without there being any litigants in court, without any one's rights being involved or any one's status being up for determination, and that the Court there said, in effect, that such an abstract question was in no sense a case or controversy. It will be noted that the definition quoted by Justice Day states that: "The term implies the existence of *present* or *possible* adverse parties whose contentions are submitted to the court for adjudication." (Italics ours.) The contentions of no one were directly involved in the matter and, therefore, it was not a case. See *California* v. *San Pablo and Tulare Railroad Company*, 149 U. S. 308. The difference in the controlling facts before the Court in the *Muskrat* case and the facts before this court now will appear as we proceed.

In the *Postum Cereal Company* case, *supra*, the learned Chief Justice, speaking for the Court, and in holding that, on account of the "case" and "controversy" provision of Article III, the Supreme Court was prohibited from considering the appeal, said:

> * * * The decision of the Court of Appeals under §9 of the Act of 1905 is not a judicial judgment. It is a mere administrative decision. It is merely an instruction to the Commissioner of Patents by a court

> which is made part of the machinery of the Patent Office for administrative purposes. In the exercise of such function it does not enter a judgment binding parties in a case as the term case is used in the third article of the Constitution. * * * This result prevents an appeal to this Court, which can only review judicial judgments. * * *
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> * * * For here the action of the Court of Appeals in its dismissal was dealing with something which, even if it should have been received, was not in the proper sense a judgment at all. Whatever the form of the action taken in respect of such an appeal, it is not cognizable in this Court upon review, because the proceeding is a mere administrative one.

We submit that a very different situation prevails in the case at bar. Here are real parties litigant, whose rights and status are vitally affected by the litigation. If the presence of parties to the action is the test, then the requirement is fulfilled in that particular. The legal question submitted for this Court's decision is not academic or moot, and the rights of the litigants before us are vitally affected by the judgment of this court. A question of law, involving the construction of a "law of the United States", which prescribes the rights of the litigants, is here tried, in the regular form of judicial procedure, and when decided becomes a "final" judgment and the basis of future action.

We must bear in mind that the act under consideration definitely states "that the judgment of said court shall be final, except that the same shall be subject to review by the United States Supreme Court upon certiorari applied for within three months after such judgment of the United States Court of Customs Appeals", and we think that the judgment of this court, or the judgment of the United States Supreme Court, upon the question of law involved, is binding and final as to the whole world. The parties, under authority of a law of the United States, submitted to the tribunal below the initial determination of the question of unfair methods, etc. When the case reached this court on "a question or questions of law only" an important and valuable right between interested, present parties was to be adjudicated with "final" effect.

The question before us is: When the case reaches us is it a "case" or a "controversy"? It is not a question as to what it was in the tribunal below, but what it is when it reaches us. A long line of decisions of the Supreme Court holds that there are matters involving public and private rights, position and status which, if presented in such form that the judicial power is capable of acting thereon, become susceptible of judicial determination and that such matters may be, by Congress, brought to the cognizance of inferior courts of the United States. *Tutun* v. *United States*, 270 U. S. 568; *Fidelity National Bank and Trust Company of Kansas City et al.* v. *Swope et al.*, 275 U. S. 123; *Murray's Lessee et al.* v. *Hoboken Land and Improvement Co.*, 59 U. S. 272, 284; *Interstate Commerce Commission* v. *Brimson*, 154 U. S. 447; *United States* v. *Ritchie*, 17 How. 524, *La Abra Silver Mining Company* v. *United States*, 175 U. S. 423, 453-457; *Fong Yu Ting* v. *United States*, 149 U. S. 698, 729.

We think, under the last cited cases, the instant matter is presented in such a form as to call the exercise of the judicial powers of this court in so far as the question involves the trial and adjudication, in a judicial procedure, of rights and privileges which by the judgment of this court is made "final" as to the matters involved as against all parties. Whether the importers are denied the right to import is not the question. But if it were, and their legal status had been adjudicated, adversely to them, prevention from the continuance of such unlawful status, we think, might be had. *Marbury* v. *Madison*, 1 Cranch, 137, 170; *Field* v. *Clark*, 143 U. S. 649; *Hampton, Jr., & Co.* v *United States*, 14 Ct. Cust. Appls. 350, T. D. 42030; 275 U. S.—, No. 242. The parties have had their day in court where a definite, legal issue, involving a valuable right, is finally adjudicated The status of the importers being thus finally and definitely fixed, as the basis of future action, what future action, if any, may be taken is, to the courts, of no concern.

Is the judgment of this court in the matter at bar a "judicial judgment" or an administrative decision within the meaning of the *Postum Cereal Company* case, *supra?* We think it is the former, because it is the final, conclusive judicial determination of the fact as to whether or not the party has been guilty of unfair methods, etc., and a final and conclusive judgment applying the law to the facts, and, as such, it would be regarded as *res adjudicata* of that issue in any court whenever questioned. *Fidelity National Bank and Trust Company of Kansas City, et al.* v. *Swope, et al., supra.* And, furthermore, it could not be collaterally attacked. If a "judicial judgment" be one which is final and conclusive as between the parties on the issues involved and not subject to collateral attack, then the judgment of this court in the matters now before it meets the test and is a "judicial judgment." Such a judgment does not have to be for money, or for the recovery of a thing, or involve anything that a writ or process may enforce, but may be the determination of a status, or a right, or a privilege, or "the basis of action." *Tutun* v. *United States, supra; Interstate Commerce Commission* v. *Brimson, supra; Fidelity National Bank and Trust Company of Kansas City, et al.* v. *Swope, et al., supra.* The ultimate test is: Is the judgment final? *Postum Cereal Company, supra.*

The *Tutun* case involved the question as to whether an order of a district court granting or denying a petition for naturalization was a final decision and whether or not such a proceeding was a "case" within the meaning of Article III of the Constitution. A unanimous court held, in a very well written and well considered opinion, by Mr. Justice Brandeis, that such an order was a final decision and was a "case" within the meaning of Article III and within the meaning of the Judicial Code, and that such a case was reviewable by the Circuit Court of Appeals. No property rights were involved, but a status was to be determined, which status, however, when declared, could be revoked or a new application filed in the same or another court. Notwithstanding this fact, the court held, citing *Hayburn's Case*, 2 Dall. 408; *United States* v. *Ferreira*, 13 How. 39; *Muskrat* v. *United States*, *supra*, that it was a case within the meaning of Article III and was triable and reviewable by the inferior courts. The learned judge, speaking for the court said

> * * * The order granting or denying a petition for naturalization is clearly a final decision within the meaning of that section. *Ex parte Tiffany*, 252 U. S. 32. This is true, although a certificate granted may be cancelled under §15 of the Naturalization Act, *United States* v. *Ness*, 245 U. S. 319, and a denial of the petition may not preclude another application for naturalization. *In re Pollock*, 257 Fed. 350. * * *
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> * * * Whenever the law provides a remedy enforceable in the courts according to the regular course of legal procedure, and that remedy is pursued, there arises a case within the meaning of the Constitution, whether the subject of the litigation be property or status. A petition for naturalization is clearly a proceeding of that character.
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> The petitioner's claim is one arising under the Constitution and laws of the United States. The claim is presented to the court in such a form that the judicial power is capable of acting upon it. The proceeding is instituted and is conducted throughout according to the regular course of judicial procedure. The United States is always a possible adverse party. By § 11 of the Naturalization Act the full rights of a litigant are expressly reserved to it. See *In re Mudarri*, 176 Fed. 465. Its contentions are submitted to the court for adjudication. See *Smith* v. *Adams*, 130 U. S. 167, 173-174. Section 9 provides that every final hearing must be held in open court; that upon such

hearing the applicant and witnesses shall be examined under oath before the court and in its presence; and that every final order must be made under the hand of the court and shall be entered in full upon the record. The judgment entered, like other judgments of a court of record, is accepted as complete evidence of its own validity unless set aside. *Campbell* v. *Gordon*, 6 Cranch 176; *Spratt* v. *Spratt*, 4 Pet. 393, 408. It may not be collaterally attacked. *Pintsch Compressing Co.* v. *Bergin*, 84 Fed. 140. If a certificate is procured when the prescribed qualifications have no existence in fact, it may be cancelled by suit. "It is in this respect," as stated in *Johannessen* v. *United States*, 225 U. S. 227, 238, "closely analogous to a public grant of land (Rev. Stat., § 2289, etc.,) or of the exclusive right to make, use and vend a new and useful invention (Rev. Stat., § 4883, etc.)."

The opportunity to become a citizen of the United States is said to be merely a privilege and not a right. It is true that the Constitution does not confer upon aliens the right to naturalization. But it authorizes Congress to establish a uniform rule therefor. Art. I, §8, cl. 4. The opportunity having been conferred by the Naturalization Act, there is a statutory right in the alien to submit his petition and evidence to a court, to have that tribunal pass upon them, and, if the requisite facts are established, to receive the certificate. See *United States* v. *Shanahan*, 232 Fed. 169, 171. There is, of course, no "right to naturalization unless all statutory requirements are complied with." *United States* v. *Ginsberg*, 243 U. S. 472, 475; *Luria* v. *United States*, 231 U. S. 9, 22. The applicant for citizenship, like other suitors who institute proceedings in a court of justice to secure the determination of an asserted right, must allege in his petition the fulfillment of all conditions upon the existence of which the alleged right is made dependent; and he must establish these allegations by competent evidence to the satisfaction of the court. *In re Bodek*, 63 Fed. 813, 814, 815; *In re An Alien*, 7 Hill (N. Y.) 137. In passing upon the application the court exercises judicial judgment. It does not confer or withhold a favor.

Thus we see, in this late pronouncement, an individual may bring a proceeding in a district federal court to acquire a certificate which involves no property right, but merely a status, and which certificate is only *prima facie* evidence of his status, and which may be cancelled by suit if the facts upon which the certificate was granted are afterwards judicially ascertained to be incorrect, and such a proceeding is declared to be a "case" within the meaning of Article III, section 2, because it was a matter *presented in such form that judicial action might be had upon the proof and issues presented where a status or a right was involved.*

We regard the principles announced in the recent decision of the Supreme Court of the United States in *Fidelity National Bank and Trust Company of Kansas City et al., supra,* as being conclusive authority for the position we have taken in this case. In a very logical opinion by Mr. Justice Stone, the reasoning and conclusions in *Tutun v. United States, supra,* are approved and the application of the terms "cases" and "controversies" to the issues at hand is stated in such a definite manner as to decide precisely, we think, the question before us.

The charter of Kansas City, concerning public street improvements, provided that after the city had passed its ordinance for the improvements and made an approximate estimate of the costs of the work as affecting the owners of the lands chargeable, that the city should file a proceeding in the Circuit Court of Jackson County, Missouri, against the owners of the land for the purpose of having the court determine the validity of the ordinance and the question as to whether or not the respective tracts of land should be chargeable with the lien of said work as provided by the ordinance. After judgment, if the validity of the ordinance and lien was upheld, the improvements might proceed. The object of the legal determination of such validity, as an intermediate step in the improvement proceeding, was obviously for the purpose, among other things, of insuring the sale of the bonds. Tax bills were issued against the several benefited tracts of land, some of which bills were held by the Fidelity National Bank and Trust Company. Swope and others, being the owners of certain lands assessed, brought suit to cancel the tax bills issued against them. The proceeding was instituted in the federal court, on account of the diversity of citizenship.

One of the important questions before the Circuit Court of Appeals and the Supreme Court was as to whether the action in the State court was a "case" or a "controversy." It was, apparently, conceded that if it was a "case" or a "controversy" there, it was a "case" or a "controversy" when it reached the federal court. The Supreme Court said:

> But if the determination of the state court was *res adjudicata* according to its laws and procedure, no reason is suggested, nor are we able to perceive any, why it is not to be deemed *res adjudicata* here, if the proceeding in the state court was a "case" or "controversy" within the appellate jurisdiction of this Court, Fed. Const. Art. III, §2, so that constitutional rights asserted, or which might have been asserted in that proceeding, could eventually have been reviewed here.
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> That this proceeding authorized by §28 of the Kansas City charter was judicial in character appears from an inspection of the statute and the record in the circuit court. The proposed improvement having been authorized, the benefit district established, the estimated cost ascertained, all by action of the city council or the board of public works essentially legislative in character, the jurisdiction of the state court was invoked in an adversary proceeding to determine the validity of the liens imposed or to be imposed under the ordinance. That court is a court of general jurisdiction, having plenary power to determine all questions arising under the state law or the laws and Constitution of the United States. Section 2436 Mo. Rev. Stat. 1919; *Schmelzer* v. *Kansas City*, 295 Mo.

322. These questions are required to be determined in a trial in accordance with the laws and constitution of the State. The sole duty and power of the court is to pass upon questions of law and to inquire judicially into the facts so far as necessary to ascertain the applicable rules of law. See *Keller* v. *Potomac Elec. Co.*, 261 U. S. 428, 440. Under this procedure, the judgment to be awarded finally determines, subject to appeal, the validity of the ordinance authorizing the improvement, the limits of the benefit district, the method of apportioning benefits, and the validity of the proposed liens. That the issues thus raised and judicially determined would constitute a case or controversy if raised and determined in a suit brought by the taxpayer to enjoin further proceedings under the ordinance could not fairly be questioned. Compare *Risty* v. *Chicago, R. I. & Pac. Ry. Co.*, *supra*. They cannot be deemed any the less so because through a modified procedure the parties are reversed and the same issues are raised and finally determined at the behest of the city. * * *

While ordinarily a case or judicial controversy results in a judgment requiring award of process of execution to carry it into effect, such relief is not an indispensable adjunct to the exercise of the judicial function. Naturalization proceedings, *Tutun* v. *United States*, 270 U. S. 568; suits to determine a matrimonial or other status; suits for instructions to a trustee or for the construction of a will, *Traphagen* v. *Levy*, 45 N. J. Eq. 448; bills of interpleader, so far as the stakeholder is concerned, *Wakeman* v. *Kingsland*, 46 N. J. Eq. 113; bills to quiet title where the plaintiff rests his claim on adverse possession, *Sharon* v. *Tucker*, 144 U. S. 533; are familiar examples of judicial proceedings which result in an adjudication of the rights of litigants, although execution is not necessary to carry the judgment into effect, in the sense that no damages are required to be paid or acts to be performed by the parties. *Cf. Kennedy* v. *Babcock*, 19 Misc (N. Y.) 87; *Cohen* v. *N. Y. Mutual Life Ins. Co.*, 50 N. Y. 610, 625. Nor is it essential that only established and generally recognized forms of remedy should be invoked. "Whenever the law pro-

> vides a remedy enforceable in the courts according to the regular course of legal procedure, and that remedy is pursued, there arises a case within the meaning of the Constitution, whether the subject of the litigation be property or status." *Tutun* v. *United States, supra,* 577. Thus, naturalization proceedings, *Tutun* v. *United States, supra,* or a special statutory proceeding to determine judicially whether the claim made by a domestic corporation against a foreign country upon which an award had been made by a United States commissioner pursuant to treaty, had been furthered by fraud, the statute authorizing distribution of the fund in accordance with the judgment, *La Abra Silver Mining Co.* v. *United States,* 175 U. S. 423, are cases or controversies within the meaning of the Constitution.

Other cases might be quoted from at length to the same effect. Among them, prominently, are *Murray's Lessee et al.* v. *Hoboken Land and Improvement Co., supra,* and *Interstate Commerce Commission* v. *Brimson, supra.* In the first of these cases it appears that Congress had authorized a collector to bring before a district court the question of how much he was indebted to the Government. The act provided that the submission of the question to the district court suspended the distress warrant issued by the Solicitor of the Treasury Department and that, in effect, the judicial determination of the amount due fixed the sum to be collected on the warrant. The court, in holding that such a proceeding brought before the court a matter which was properly the subject of judicial cognizance, said:

> To avoid misconstruction upon so grave a subject, we think it proper to state that we do not consider congress can either withdraw from judicial cognizance any matter which, from its nature, is the subject of a suit at the common law, or in equity, or admiralty; nor, on the other hand, can it bring under the judicial power a matter which, from its nature, is not a subject for *judicial determination. At the*

same time there are matters, involving public rights, which may be presented in such form that the judicial power is capable of acting on them, and which are susceptible of judicial determination, but which Congress may or may not bring within the cognizance of the courts of the United States, as it may deem proper. Equitable claims to land by the inhabitants of ceded territories form a striking instance of such a class of cases; and as it depends upon the will of congress whether a remedy in the courts shall be allowed at all, in such cases, they may regulate it and prescribe such rules of determination as they may think just and needful. Thus it has been repeatedly decided in this class of cases, that upon their trial the acts of executive officers, done under the authority of congress, were conclusive, either upon particular facts involved in the inquiry or upon the whole title. Foley *v.* Harrison, 15 How. 433; Burgess *v.* Gray, 16 How. 48;—— *v.* The Minnesota Mining Company at the present term. (Italics ours.)

It is true, also, that even in a suit between private persons to try a question of private right, the action of the executive power, upon a matter committed to its determination by the constitution and laws, is conclusive. Luther *v.* Borden, 7 How. 1; Doe *v.* Braden, 16 How. 635.

To apply these principles to the case before us, we say that, though a suit may be brought against the marshal for seizing property under such a warrant of distress, and he may be put to show his justification; yet the action of the executive power in issuing the warrant, pursuant to the act of 1820, passed under the powers to collect and disburse the revenue granted by the constitution, is conclusive evidence of the facts recited in it, and of the authority to make the levy; that though no suit can be brought against the United States without the consent of congress, yet congress may consent to have a suit brought, to try the question whether the collector be indebted, that being a subject capable of judicial determination, and may empower a court to act on that determination, and restrain the levy of the warrant of distress within the limits of the debt judicially found to exist.

The question before us, now, is presented *in such form as to bring it under the judicial power* and "is presented in such form that the judicial power is capable of acting" thereon and is "susceptible of judicial determination."

In *Interstate Commerce Commission* v. *Brimson, supra,* a circuit court of the United States was called upon to direct witnesses to appear and testify before the Interstate Commerce Commission, and it was contended that the matter was not a case or a controversy and that, therefore, the court, being an inferior court, was without jurisdiction under Article III of the Constitution. The Supreme Court held to the contrary, notwithstanding the fact that the proceeding was merely in the nature of an aid to the Interstate Commerce Commission in the discharge of an administrative duty, and notwithstanding the fact that if the Interstate Commerce Commission dismissed the proceeding, the mandate of the Circuit Court was without further effect. It was the determination of a status, the judicial determination of a controverted matter, which was to be a part of the proceeding, administrative in character, but was a "final and indisputable basis of action" as between the Commission and the defendants. Mr. Justice Harlan, speaking for the Court, said:

> * * * If it be adjudged that the defendants are in law, obliged to do what they have refused to do, that determination will not be merely ancillary and advisory, but, in the words of *Sanborn's case*, will be a "final and indisputable basis of action," as between the Commission and the defendants, and will furnish a precedent in all similar cases. It will be as much a judgment that may be carried into effect by judicial process as one for money, or for the recovery of property, or a judgment in mandamus commanding the performance of an act or duty which the law requires to be performed, or a judgment prohibiting the doing of something which the law will not sanction. It is none the less the judgment of a judicial tribunal dealing with questions judicial in their nature, and pre-

> sented in the customary forms of judicial proceedings, because its effect may be to aid an administrative or executive body in the performance of duties legally imposed upon it by Congress in execution of a power granted by the Constitution.

If we paraphrase the above language of the Supreme Court, we can say, with equal force, that if it be adjudged that the defendants or respondents in the pending case are violators of the law under consideration, that determination "will not be merely ancillary and advisory," but will be a "final and indisputable basis of action" for future proceedings. See *Interstate Commerce Commission* v. *Baird*, 194 U. S. 25.

We cannot agree with the argument made by the appellees, the Bakelite Corporation et al., that our judgment in this case must be one that will be enforceable by execution or process. If it declares or denies the existence of a right or a status (and does so conclusively and finally) which in turn affects a valuable interest or right, and otherwise meets the requirements of a "case" and "controversy," under the foregoing decisions cited, it certainly is such. *Fidelity National Bank and Trust Company of Kansas City et al.* v. *Swope et al.*, *supra*.

Let us suppose that this court, and the Supreme Court, reviewing our judgment, should hold that the violation of a patent right is, in law, not an unfair method of competition or an unfair act in importation. Could the President lawfully hold that it was? We think not. The statute would seem to leave the definition of these terms to the courts as it did in the Federal Trade Commission Act. *Federal Trade Commission* v. *Gratz et al.*, 253 U. S. 421; *Federal Trade Commission* v. *Curtis Publishing Company*, 260 U. S. 568. As an illustration of this conclusion, let us again suppose that after this court or the Supreme Court had held that the violation of a patent right was not such an "unfair method," etc. the President would decide that it was, and such decision would cause the collector to reject the entry of respondent's merchandise, and he would litigate the matter on the theory that the question had been adjudicated. What could any court do but hold that as between the parties the matter had been finally and conclusively determined in the court and that its decision was *res adjudicata?*

Section 316 of the Tariff Act of 1922, which is now in part before us for construction, in many respects is an absolute and precise copy of the Federal Trade Commission Act, U. S. Stat. at Large, Vol. 38, part 1, chapter 311, p. 717, and the Anti-Trust Act (Clayton Act), U. S. Stat. at Large Vol. 38, p. 730.

The Federal Trade Commission is, admittedly, an administrative body and its acts have been declared to be administrative in character, and not judicial. *Federal Trade Commission* v. *Eastman Kodak Company et al.*, 274 U. S. 619. The Federal Trade Commission Act, however, provides that unfair methods of competition in commerce are unlawful. The Act at bar provides that "unfair methods of competition and unfair acts in importation" are unlawful. Both acts provide that the respective bodies, the Federal Trade Commission and the United States Tariff Commission, may institute proceedings for determining the question of fact as to whether or not the party complained of is in violation of the law in the respect indicated. The Federal Trade Commission, after finding its facts, is authorized to issue an order requiring such person to desist from the unlawful practice. If the person so ordered fails to comply, the Commission may apply to the Circuit Court of Appeals for the enforcement of its order, or the party so ordered may obtain a *review* or file a petition to set aside the order, which proceeding is nothing more than an appeal, regardless of what it may be styled in the Act. *United States* v. *Ritchie, supra; Stephens* v. *Cherokee Nation,* 174 U. S. 445, 477. The Commission files its record in that court, which issues notice upon the same, and determines the questions therein, and *may affirm, modify or set aside* the orders of the Commission.

In the Federal Trade Commission Act, as in the Act before us, it is provided that the findings of the Commission as to the facts, if supported by the testimony, shall be conclusive. In both Acts the same provision is made for taking new testimony. When the matter is before the Federal Trade Commission its finding is not a judgment, and it has no process to enforce its decree, but when the matter gets into the Circuit Court of Appeals or the Supreme Court of the United States it is there "presented in such form" that judicial cognizance may be taken thereof and a final, binding judgment, as to the question passed upon, may be had.

What has been said here as to the review by a Circuit Court of Appeals of an order of the Federal Trade Commission is also true as to the enforcement provision of the Clayton Anti-Trust Act. The Clayton Anti-Trust Act and the United States Tariff Commission provision under consideration seem to be almost in the exact phraseology of the Federal Trade Commission Act.

In *Interstate Commerce Commission* v. *Brimson, supra*, the Supreme Court held that the proceeding before a circuit court of appeals to compel witnesses to answer questions before the Interstate Commerce Commission was not repugnant to the Constitution as not being a "case" or "controversy". As far as we have been able to ascertain, the power of such court to review and "reverse, modify and set aside" the orders of the Interstate Commerce Commission and the Federal Trade Commission has never been further questioned. Certainly these proceedings are in the nature of an *aid or a help to an administrative body in the performance of a purely administrative duty*. They are not "cases" before the commissions and they are not independent actions before the court. They are, however, held to be "cases" although the identical issues arose and were passed upon by an administrative body.

True enough, the judgment of the Circuit Court of Appeals in some of the matters it reviews from the two commissions mentioned may have the matter presented to them in such form that process may reach out and execute the judgment, but in others, as we have seen, this does not maintain, and, in our view of the matter, it is not essential that the action should be such an one as to require or necessitate process. *Tutun* v. *United States, supra; Murray's Lessee et al.* v. *Hoboken Land and Improvement Company, supra; Fidelity National Bank and Trust Company of Kansas City et al.* v. *Swope et al., supra.*

On October 7, 1922, President Harding issued his executive order, which is still in full force and effect, and is as follows:

> It is ordered, that all requests, applications, or petitions for action or relief under the provisions of sections 315, 316 and 317 of Title III of the Tariff Act approved September 21, 1922, shall be filed with or referred to the United States Tariff Commission for consideration and for such investigation as shall be in accordance with law and the public interest, under rules and regulations to be prescribed by such Commission. See *Opinions of Attorneys General*, Vol. 34, p. 79.

Without suggesting what weight the indicated executive interpretation of the Act involved in the order is to be given in the consideration of the question at hand, we regard it as of some importance as illustrating the operation of the Act when given a certain construction.

The foregoing considerations lead us to the conclusion that the matters presented in the instant appeal are presented in such form as to call for the exercise of the judicial powers of this inferior court, and that our exercise of the same is not in contravention of the provisions of the Constitution.

The motion of the Bakelite Corporation et al. is, therefore, overruled.

CONCURRING OPINION

Barber, *Judge*.

I concur in the conclusions reached by the court, but it would, in my opinion, be more in conformity with the established practice of this court to enter judgment denying the motion to dismiss without now handing down an opinion.

The only controverted issue is whether or not a case or controversy, within the meaning of Section 2 of Article III of the Constitution, is presented, of which this court, as an inferior court, ordained and established by Congress under Section 1 of said article, has jurisdiction. An opinion on that question can better be written after the case has been heard on the merits. So far as I recall, our practice has been, when a motion to dismiss for want of jurisdiction *is denied*, to discuss all relevant questions in the opinion handed down when the case is heard and decided upon the merits.

See *Atlantic Transport Co.* v. *United States*, 5 Ct. Cust. Appls. 373, T. D. 34872; *Fish* v. *United States*, 12 Ct. Cust. Appls. 308, T. D. 40315.

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IN THE

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1928.

No. 17, Original.

Ex Parte: THE BAKELITE CORPORATION,
PETITIONER.

SUPPLEMENTAL BRIEF ON BEHALF OF THE BAKELITE CORPORATION, PETITIONER, ON THE SUBJECT OF THE CONSTITUTIONAL CHARACTER OF THE UNITED STATES COURT OF CUSTOMS APPEALS.

FILED BY LEAVE OF COURT GRANTED JANUARY 14, 1929.

The opinion of the Court of Customs Appeals in this case held that that court was a constitutional court under Article III, Section 1 of the Constitution.

This was not attempted to be controverted by any party when the case was before the lower court. It was, therefore, deemed that the question was not of such importance in the present application as to require complete briefing. This view was confirmed by the brief of the Solicitor General and of the intervenor.

The memorandum attached to the Solicitor General's brief marked "H" was brought to our attention on the filing of that brief the day the case was set for argument.

As this court referred to the matters set forth in this memorandum on the argument, we desire to present the question more fully than it was presented in the original brief.

The main point raised by the memorandum in question is whether or not the Congress under the grants of power contained in the Constitution to create courts has the power of creating courts which are not inferior courts under Article III of the Constitution, but still exercise some of the jurisdiction of inferior courts as limited by Section 2 of Article III.

The intimation is that the Court of Customs Appeals is one of such a type of court rather than an inferior court under the Constitution. An examination of the terms of Article III shows that the Constitution provided that the judicial power of the United States shall be vested in one Supreme Court, and in such inferior courts as the Congress may from time to time ordain and establish.

It provides that the judges of such courts shall (1) hold their offices *during good behavior*, and (2) receive a compensation which *shall not be diminished* during their continuance in office.

The first suggestion we make is that the question for decision *is not what Congress may do in reference to establishing judicial tribunals, but what it did do.* What kind of court did it intend to create and under what powers did it purport to act when it created the United States Court of Customs Appeals?

In order to arrive at the intention of Congress, in order to determine what it did do, it is not only proper, but highly important that all the applicable rules of statutory construction be resorted to. The context of the act of creation, similar acts of creation, the history of the times, the proceedings in Congress and reports of the committees of Congress, are in most instances, as here, illuminating as to the intention of the legislature.

I.

THE LEGISLATIVE HISTORY, THE CONGRESSIONAL DEBATES, AND THE REPORTS OF THE SENATE COMMITTEE ON FINANCE, WHICH COMMITTEE INITIATED THE LEGISLATION, INDICATE THAT CONGRESS INTENDED TO CREATE AN INFERIOR COURT UNDER ART. III OF THE CONSTITUTION.

So far as we have been able to observe, the legislative records of almost a century and a half afford no example of a court-creating statute which in terms states that Congress is thereby creating a legislative court, a constitutional court, or an inferior court. Notwithstanding this fact, the Supreme Court of the United States on numerous occasions has determined the character of various courts created by Congress, some of which were declared to be legislative in character and others inferior in character, and by inferior we mean such courts as are authorized by Article III of the Constitution.

An examination of the legislative proceedings of Congress in connection with the establishment of the United States Court of Customs Appeals seems to us to be convincing, beyond a reasonable doubt, that the framers of the law had no other purpose in mind than to create an inferior court, the jurisdiction of which should extend to cases and controversies, a jurisdiction carved out of the then-existing constitutional judicial system, and whose judges should have tenure of office during good behavior and whose salaries should not be diminished during their continuance in office.

Let it be remembered that subsection 29 of section 5 of the Payne-Aldrich tariff act of August 5, 1909, found its way into the bill by amendment in the Senate, which bill was, with the amendment, accepted by the House. No committee report on this feature of the bill is found in any public document, for the reason above stated, but an examination of the Congressional Record of July 7, 1909, 61st Congress, 1st Session, Vol. 44, page 4320, discloses that Senator Flint, in charge of the subcommittee, and for the Committee on Finance, declared the nature and purposes of the court created by the amendment. This report of the committee and the speeches by senators of the committee in debate are filled with statements pregnant with meaning as to the character of the court proposed.

Senator Dolliver doubted the wisdom, at that stage of the proceeding, of not stopping to inquire whether "it is wise now to superimpose on the complex machinery of our customs tariff laws this new judicial tribunal, *with a life term of office,* unknown hitherto to our laws, and which starts out with a bill of expenses equal to the entire cost of maintaining the Supreme Court of the United States" (page 4308). He previously said:

> "Yet here we come with an agitation, arising I know not in what quarter, asking us to create a new court in the United States *with lifelong tenure*" (page 4307).

Senator Borah, who opposed the creation of a specialized court, said:

> "Mr. President, that can all be corrected by statute, without the creation of a new tribunal. A new tribunal will have no more to do with it than the present tribunals" (Circuit Courts and Circuit Courts of Appeal) "unless you do have a statute. * * * If there has been an unfortunate use of language in our statutes, it can be remedied here; but it certainly ought not to be remedied by creating a court which will interpret the law, not as it is written, but as some one supposes it was written" (pages 4310, 4311).

Senator Cummins opposed the amendment for the same reason (pages 4311, 4312).

Senator Clapp:

> "Yet for this small amount of business it is proposed to create a new court, to limit that

court to this particular work, and to so limit them that they can render the public no other service" (page 4309).

Senator Bailey, who favored the amendment:

> "I think there is no class of cases about which we should be so deeply concerned, not only for a correct, but for a prompt decision, as customs cases. There are $330,000,000 involved in the customs collections throughout the country"; (Now there is nearly twice this amount.) "* * * Therefore, on this question of mere dollars and cents involved in the construction of the revenue laws of the country, I do not believe the Supreme Court's work ought to be increased by these appeals when it is already beyond the capacity of the most industrious justices to perform" (page 4317).

Senator McCumber:

> "For that second reason it was thought best to have a court whose whole attention, whose *whole life work*, should be given to that particular subject. * * * It is a court of review or a court of appeals, whatever you may call it. It takes no original evidence; it acts only upon the question of the construction of the law and the application of that law to the peculiar technical cases that will be brought before it as evidenced by the record that will be sent up" (page 4319).

Senator Aldrich, Chairman of the Finance Committee, said:

> "It is to secure the prompt, honest, and uniform administration of our customs laws; and in

> my judgment, if we can secure this result, it will save the country and save the Government of the United States, and save the people of the United States millions of dollars" (page 4310).

In the report of the committee made by Senator Flint, beginning at page 4322, *supra*, we find, among other things, the following:

> "Customs cases differ essentially from any other class of cases. Each of them is a question in which the whole country at large is interested. For they bear upon and directly affect the terms and administration of a law that affects every citizen of the land. It should not be regarded a criticism upon the courts of any circuit that the Congress, in its deliberation, should conclude to take from that circuit and place in a different jurisdiction cases previously within it. Congress creates courts; the Senate approves all judges; Congress devolves upon every court except the Supreme Court the jurisdiction of that court. It is within the plenary powers of the Constitution devolved upon the Congress to create, to add to, or to subtract from the jurisdiction of any court. It is the duty of Congress to vest these jurisdictions in such tribunals, to take them from the one tribunal, invest them in another, as in its opinion is for the best interests of the country. * * * *It is the constitutional prerogative of the Congress to create inferior federal courts.* It is the prerogative of the Congress alone to provide for the appointment of judges and to create their jurisdiction, (note the absence of the word *tenure*) to add to that jurisdiction, or to take

from it. It is the province of the judiciary alone to pass upon the cases confined to that jurisdiction by the Congress. It is for the judiciary to determine issues properly presented to them. It is for the Congress to determine what issues shall be presented before certain courts and what not. * * *. The committee believes these cases involve questions of national concern, * * *. Under the previous system of appeals in customs cases, the ultimate authority being the different circuit courts or circuit courts of appeal throughout the United States, a great lack of uniformity of decision resulted. * * * And it is the purpose of the committee in the presentation of this amendment to provide a tribunal with sufficient salary to secure in the personnel of this court judges of high attainments and understanding and to clothe them with duties not such as would require the rushing through of cases similar to that followed in police and justices' courts, but to have ample opportunities in cases of small moment, as well as cases of large moment, to thoroughly investigate not only the law, but all the facts surrounding the same, that their decisions, when rendered, may be intelligent and sound. * * * *It is the purpose of this bill to create a tribunal the jurisdiction of which will take the place of, and consign to its jurisdiction in all customs cases, that now covered by the United States circuit courts of appeal and in part the Supreme Court.* The amendment is framed upon the lines and carries with it the salary which will bring into this court and *retain men as judges of high legal attainments* who will be amply paid and can afford to bring to these important questions such consideration, legal talent, and investigation of the arts, sciences, and all subjects relating thereto as will result in decisions profound, speedy, and equitable. * * * In the constitution of the different courts of the land there has been constituted a special tribunal for the hearing and determination of claims against the Government, known as the 'Court of Claims,' situated in the city of Washington. Customs cases are not unlike these, for they are claims against the Government, and whatever warrant there was in establishing the Court of Claims, there is the same warrant for the establishment of a court of customs appeals" (pages 4332, 4333, 4335, 4339, 4340). (Italics and parenthetical clause ours.)

II.

THE ACT (SUBSECTION 29, SECTION 28, ACT OF AUGUST 5, 1909) PLAINLY INDICATES THAT CONGRESS INTENDED TO CREATE AN INFERIOR COURT UNDER ARTICLE III OF THE CONSTITUTION

A consideration of the act creating the court shows plainly that the Congress was attempting to create a court under its general powers as outlined in Art. III of the Constitution. Its judges either were presumed to have a life tenure by the Constitution, or they were given no tenure at all by the Congress. The United States district and circuit judges might sit on the court. It might sit anywhere in the United States and its jurisdiction was nationwide. It was a court of record with a seal, a marshal, clerk, and other officers.

It might establish rules, issue writs, and exercise all other powers of a court. It had jurisdiction of matters theretofore heard by other inferior courts of the United States; the Supreme Court, in some cases, might review its decisions; its calendar must be called at stated intervals; after its organization, no appeal might be taken from the decision of the Board of General Appraisers to "*any other court.*" Its decisions are spoken of in the act as "judgments and decrees." (Italics ours.)

We have above called attention to the fact that no tenure of office is expressed in this statute. This is likewise true as to the District and Circuit Court Judges.

All the later acts in reference to the Circuit and District Courts are equally barren of any expression of the tenure of office of the judges (see 26 Stat. at L. vol. 26, p. 826, R. S. 1878, Title XIII, Chapter II, p. 93).

In this connection, attention is called to the fact that the only courts now existing in the United States the tenure of whose judges is not fixed by statute are the Supreme Court, the Circuit Courts of Appeals, the District Courts and the Court of Customs Appeals. This is highly significant and should have great weight in determining what kind of court was actually created in the Court of Customs Appeals.

In *McAllister* v. *United States*, 141 U. S. 174, the giving or withholding of tenure in the creation of a court was given controlling effect in determining the character of the court.

If Congress intended to create a commission, a board, an administrative tribunal, or a judicial tribunal other than a constitutional one, unquestionably it would have provided for the tenure of the judges as it has done in every instance where such a tribunal was created.

In view of these considerations, is it conceivable that the legislative body intended the creation of an administrative tribunal, the judges of which could be removed at the will of the President or of the legislative branch? The jurisdiction it was transferring involved a question of vast political and economic importance, highly controversial in character—the tariff.

Is it reasonable to conclude that it was the intention of the legislature to create a legislative judicial tribunal with no independence of character, the tenure of whose judges might depend upon the will of a hostile President or Congress? If such a construction was arrived at, it would strike at the very heart of the existing customs judicial system which, during the last twenty years has established an enviable record for uniformity of decision and expedition of business, unbiased by political or petty economic prejudices, the result of which has been the fullest realization of all of the hopes of the fathers of the law.

Is it believable that the Congress, which passed the act, and the President, who approved it, intended to take the whole customs judicial jurisdiction from the then-existing, independent, inferior judicial system and turn it over to a tribunal, temporary in character, the judges of which would be shorn of the independence and freedom of action which characterized the judges of the courts from which the jurisdiction was taken? Is it reasonable to presume that it was the legislative intent to put all final appeals involved in litigation arising from the highly controversial tariff question, in charge of a tribunal whose judges, if their tenure and salary was dependent upon Congress or the President, would not possess the independence and freedom of action intended by the framers of the constitution for courts handling federal matters of such vast importance?

The appellate jurisdiction of the Court of Customs Appeals is the same as that theretofore existing in the Circuit Court of Appeals in like cases. Its jurisdiction was distinctly carved out of the jurisdiction of the latter court. Surely the Circuit Court of Appeals was a constitutional court. It is unbelievable that in all the customs cases decided by it, and in many instances reviewed by the Supreme Court, they were passing upon matters outside of the jurisdiction of a Federal Court. For forty years the Supreme Court has been taking jurisdiction of these cases on appeal without any question that these are cases on which the Constitution granted power to the Federal Courts to pass.

III.

THE MATTERS TO BE HEARD BY THE COURT OF CUSTOMS APPEALS ARE CASES AND CONTROVERSIES.

The Supreme Court and the inferior courts created under Art. III of the Constitution must be limited in their jurisdiction to cases or controversies. (*Liberty Warehouse* v. *Grannis*, 273 U. S. 70, 71). No difference exists between the Supreme Court and such inferior courts in this respect. *Postum Cereal Co.* v. *California Fig Nut Co.*, 272 U. S. 693. Such courts must be invested with such a part of the judicial power set forth in Article III as the Congress determines to give to them. The cases within its jurisdiction undoubtedly are comprehended within the phrase of cases "in law and equity, arising under this Constitution, the laws of the United States * * *;" "the controversies to which the United States shall be a party * * *".

The Court of Customs Appeals fulfills all the above requirements.

The cases it considers on appeal from the Customs Court (formerly the Board of General Appraisers) must be cases or controversies or else this court could hardly have failed to deny jurisdiction thereof in the cases that have been reviewed on certiorari to the Court of Customs Appeals and the Circuit Courts of Appeals for forty years.

That a decision of that court finally determines a controversy "to which the United States shall be a party" is, of course, not open to question.

That court, upon a case made below, enters a judgment either confirming a liquidation upon which duty has been collected or directing a reliquidation and refund of duty erroneously collected.

In reappraisement matters it finally determines (on questions of law) the value upon which ad valorem duties are computed.

In the case of American manufacturers' protests it determines the dutiable status of merchandise as between an importer and the American manufacturer. (See Sec. 516 of the Tariff Act of 1922). It determines "cases in law and equity arising under * * * the laws of the United States."

It must be remembered that the jurisdiction of the Court of Customs Appeals is territorially coextensive with the United States. The decisions it gives do not alone determine the rate of duty on a particular importation, but determine the status of that type of merchandise in regard to the duty it shall pay and hence will affect every person in the country dealing in or consuming such merchandise. When it is considered the vast amount of customs revenue collected, (more than a half billion dollars, involving importations valued at over four billions of dollars), all of which may be finally litigated in that court, it is clear that investiture thereof under the Constitution is the only way it can be established without an invasion of the rights of the people of the United States.

IV.

CONCLUSION TO BE DRAWN FROM CONSIDERATION OF THE LEGISLATIVE HISTORY AND TEXT OF THE ACT.

The Congress, by the Congressional debates and the reports of its committees, gave plain evidence that it considered it was creating an inferior court of the United States, under Art. III of the Constitution. By the act, every bit of phraseology is indicative that such a court was created. In view of this, the inquiry presents itself:

If the Congress did not create, in the United States Court of Customs Appeals, an inferior court under its powers given by Art. III of the Constitution, what language could it have used to do so?

V.

OTHER RELEVANT LEGISLATIVE ACTS INDICATE THAT CONGRESS REGARDS THE COURT OF CUSTOMS APPEALS AS A CONSTITUTIONAL COURT, UNDER ART. III.

That the Congress intended to create an inferior court under its powers given by Article III of the Constitution, is further manifest from a consideration of the following:

First. The act of Aug. 5, 1909, creating the Court of Customs Appeals (36 Stat. 105) provided:

> "That in case of a vacancy or the temporary inability or disqualification for any reason of one or two judges of said Court of Customs Appeals, the President of the United States may, upon the request of the presiding judge of said court, designate any qualified United States circuit or district judge or judges to act in his or their place, and such United States judge or judges shall be duly qualified so to act."

Here, judges of admittedly inferior courts of the United States, under Article III of the Constitution were directed to sit on said Court of Customs Appeals. If the matters of which said Court of Customs Appeals had jurisdiction were not cases or controversies, and if said Court of Customs Appeals was a mere legislative tribunal, then such assigned judges could not sit. *Heyburn's Case*, 2 Dallas, 409; *United States* v. *Ferreira*, 13 How. 39. Either the Congress knew it was assigning to such judges a duty which they could not perform, or the Congress felt that it was creating, in the Court of Customs Appeals, another inferior court of the United States, under the Constitution, where such judges might lawfully sit. That construction must be adopted which will give effect to every part of the legislation, if possible.

Second. The original act creating the Court of Customs Appeals was a part of the tariff act of Aug. 5, 1909. On March 3, 1911, the Congress passed an act entitled "An Act to codify, revise, and amend the laws relating to the Judiciary." (36 Stat. 1087.) In this act were included the laws relating to the various United States courts, namely, the District Courts, the Circuit Courts of Appeals, the Court of Claims, the Court of Customs Appeals, the Commerce Court, and the Supreme Court. Amendments of this act relating to the Court of Customs Appeals have been made thereafter, as amendments to the Judiciary Code. Act of Feb. 25, 1919, 40 Stat. 1156; Act of Sept. 14, 1922, 42 Stat. 837. In the first statute last above cited, fixing the salaries of the judges of the Court of Customs Appeals, the language is that said judges "shall receive salaries equal in amount to the salaries provided by this act to be paid judges of the Circuit Court of Appeals of the United States."

This was a definite legislative recognition and enumeration of the Federal judicial system.

Third. By the act amending the Judiciary Code of Sept. 14, 1922, heretofore referred to (Sec. 18), it was provided that the Chief Justice of the Supreme Court might assign judges of the said Court of Customs Appeals to sit in the Court of Appeals or in the Supreme Court of the District of Columbia, and such assignments have been frequently made. While there may be doubt as to whether these district courts are inferior courts of the United States under Art. III of the Constitution, all will concede that they are Constitutional courts under Art. I, Sec. 8, Par. 17, and exercise a part of the judicial powers of the United States. *Keller* v. *Potomac Electric Co.*, 261 U. S. 428.

When the Congress thus directed these judges to sit in other constitutional courts, did it do so with the idea in view that they were mere legislative judges and members of a legislative tribunal? No such conclusion is a reasonable one.

It may be argued that the provisions of the Tariff Act of 1922 (316a), providing for an appeal from the United States Tariff Commission to the Court of Customs Appeals, being an attempted appeal of an administrative matter, is indicative of the Congressional idea that the Court of Customs Appeals was nothing but a legislative court. No such conclusion can safely be drawn. The same section provided also for an appeal to the Supreme Court. If the Congress thought the Court of Customs Appeals a legislative court, by the same token it had the same opinion as to the Supreme Court. The Congress has on other occasions attempted to confer jurisdiction on the Supreme Court in legislative matters. *Postum Cereal Co.* v. *California Fig Nut Co.*, 272 U. S. 693. *Muskrat* v. *United States*, 219 U. S. 346. No conclusion can be safely drawn from such Congressional errors.

VI.

THE COURT OF CLAIMS, BY ANALOGY SIMILAR TO THE COURT OF CUSTOMS APPEALS, IS AN INFERIOR COURT OF THE UNITED STATES, UNDER ART. III OF THE CONSTITUTION.

An analogy may be drawn between the United States Court of Claims and the United States Court of Customs Appeals. Both were created as courts of special jurisdiction. If anything, there appears to be more reason for holding the Court of Customs Appeals to be an inferior court, under Art. III of the Constitution than is applicable to the Court of Claims. The Court of Claims was given alleged jurisdiction over matters referred to it by executive departments in cases where the claimant might have brought suit before such court. Sec. 1063, R. S. Whatever may be said as to these not being cases or controversies in the Court of Claims, no such power was given to the Court of Customs Appeals by the act creating it.

It must be considered, moreover, that the Supreme Court has never passed upon the legality of assigning such jurisdiction to the Court of Claims, as at present constituted.

There are more persuasive reasons why the U. S. Court of Customs Appeals is an inferior court under Article III, than there are for the Court of Claims. The former was, at creation, given only cases and controversies, the latter administrative matters, the judges of the former were made dependent upon the Constitution for tenure, the judges of the latter were given express tenure.

The Court of Claims has been held by the Supreme Court to be an inferior court of the United States, under Art. III of the Constitution. In *United States* v. *Klein*, 13 Wall. 128 (145), it was said:

> "The Court of Claims is thus constituted one of those inferior courts which Congress authorizes, and has jurisdiction of contracts between the government and the citizen, from which appeal regularly lies to this court."

Other cases are of similar tenor.

If it may be said that the language quoted in *United States* v. *Klein*, *supra*, does not use the term "inferior court" in the sense as used in Art. III of the Constitution, the answer to such statement may be found in *Miles* v. *Graham*, 268 U. S. 501. In that case Graham, one of the judges of the Court of Claims, sued the Collector of Internal Revenue to recover federal income taxes paid, claiming to be exempt therefrom under Sec. 1, Art. III, of the Constitution, which provides that the salaries of judges of the Supreme Court and inferior courts of the United States "shall not be diminished during their continuance in office." The Supreme Court held the plaintiff to be entitled to recover and that he was not to be subjected to such tax.

The inquiry presents itself: If a judge of the Court of Claims is exempt from income tax, how can he be thus exempt except under Art. III of the Constitution? No other such exemption is provided by that document. If he is thus exempt under Art. III, then he must be created under that article. No one could logically contend that he was created under an implied power, or under some other clause of the Constitution and be entitled to the emoluments and exemptions provided by Art. III, for those judges only, who are to be created under this article.

Thus it appears that the Supreme Court has definitely settled that the Court of Claims is an inferior court, under said Art. III.

If it is such a court, by analogy, what reason presents itself why the Court of Customs Appeals should not be so considered?

VII.

THE CONGRESS, IN CREATING COURTS, CAN ONLY DO SO WHERE ESPECIALLY AUTHORIZED BY THE CONSTITUTION. THERE IS NO EXTRA-CONSTITUTIONAL POWER TO CREATE COURTS. ALL CONSTITUTIONAL COURTS OF THE UNITED STATES ARE COURTS OF LIMITED JURISDICTION.

The provisions of the Constitution fix the utmost bounds of the judicial power of the United States.

That jurisdiction can not be extended by legislative action. *Hodgson & Thompson* v. *Bowerbank et al.*, 5 Cranch. 303; *Scott* v. *Sandford*, 19 How. 393. Article III, section 1, of the Constitution provides that "the judicial power of the United States shall be vested in one Supreme Court, and such inferior courts as the Congress may from time to time ordain and establish." Article III, section 2, defines and limits the jurisdiction of the Federal Judiciary. It would seem to follow that, if the Congress can not extend the jurisdiction of the Federal Judiciary beyond the limits of the Constitution, it can not confer the judicial power of the United States (except as hereinafter mentioned) upon any other courts than those provided for in Article III, section 1, that is, "The Supreme Court and such inferior courts as the Congress may from time to time ordain and establish."

However, the Congress has the power, under Article I, section 8, paragraph 17, of the Constitution, to exercise "exclusive legislation" over the District of Columbia, and, therefore, may create courts for the District of Columbia. Under Article IV, section 3, paragraph 2, of the Constitution, the Congress has authority to make all needful rules and regulations respecting the territory belonging to the United States. Therefore, it may establish courts for such territory. The Congress has the power to confer upon such courts the combined jurisdiction of the Federal and of the State Courts. However no judicial power conferred upon the Federal Government by Article III, section 2, of the Constitution can be exercised *in the States* by any court other than the courts provided for in

Article III, section 1. *McAllister* v. *United States*, 141 U. S. 174 to 184 inclusive, quoting with approval from the case of *American Insurance Company* v. *Canter*, 1 Pet. 511, 546. There Chief Justice Marshall said:

> * * * Although admiralty jurisdiction can be exercised in the States in those courts only which are established in pursuance of the third article of the Constitution, the same limitation does not extend to the Territories. In legislating for them, Congress exercises the combined powers of the general and of a state Government.

If this is true as to admiralty jurisdiction, it is true as to the other eight classes of cases over which the judicial power of the United States extends.

The United States Court of Customs Appeals is a court of record and, of course, has no jurisdiction except that which is within the judicial power of the United States. Its jurisdiction is exercised in each of the states of the United States, and under the act creating it, *it may sit in any judicial district of the United States*. Its jurisdiction consists solely of cases and controversies arising under the laws of the United States; and extends to the construction of the Constitution and of treaties of the United States. The United States is nearly always a party. In view of the fact that it is neither a territorial court nor a District of Columbia court, and, as its jurisdiction is exercised in each of the States of the United States, it would seem, if we are to follow the law announced in the quoted excerpt from the opinion in the case of the *American Insurance Company* v. *Canter*, *supra*, that the United States Court of Customs Appeals must be an inferior court of the United States. Obviously, if it is not an inferior court of the United States, established by virtue of Article III of the Constitution, it is not a court at all, except in name. In a great majority of the cases in this court no appeal may be taken to the Supreme Court except where a certificate of importance has been obtained from the Attorney General. Accordingly, if it is not an inferior court, then practically all of the justiciable questions within its jurisdiction are never submitted to a judicial tribunal. Obviously, then, the right of the citizen to submit justiciable questions (cases and controversies) to a Constitutional Court of the United States (a right which had always existed before the United States Court of Customs Appeals was established) is denied to him, unless, of course, it may be held that the United States Customs Court (the trial court for Customs cases) is a Constitutional Court.

It has been suggested that courts of the United States might be established, without regard to the provisions of the Constitution, by virtue of the right of sovereignty which exists in the Government of the United States. The answer is that the United States Government has no sovereign power over the states or the people of the United States, except that which has been conferred by the Constitution. And as to the States and the people thereof, the judicial power of the United States was expressly conferred and limited, both as to courts and as to jurisdiction, by Article III of the Constitution. Accordingly, there is and there can be no sovereign or inherent power in the Government of the United States superior to that conferred by Article III.

The Court of Customs Appeals is a court of limited, not of general, jurisdiction, and this is true of every Federal Court. The courts in England and in the several states of the United States, however, are courts of general jurisdiction. *Scott* v. *Sandford*, 19 How. 393, 401. Not only is the jurisdiction of the Federal Courts limited by the Constitution, but that jurisdiction has been further limited by the failure of the Congress to confer upon the courts all of the jurisdiction provided for in the Constitution. *Turner* v. *Bank of North America*, 4 Dall. 6, 11. This being so, there is no reason for suggesting that, because a court established by the Congress is given a jurisdiction over a special class of justiciable questions, it is not an inferior court of the United States.

The term "inferior courts" relates to United States Courts established by the Congress pursuant to Article III, section 1, of the Constitution, and means those courts inferior to the Supreme Court of the United States. *Turner* v. *Bank of North America*, 4 Dall. 6, 11; *McCormick* v. *Sullivant*, 10 Wheat. 192, 199.

VIII.

SPECIAL COURTS, SUCH AS THE COURT OF PRIVATE LAND CLAIMS, ETC., ARE CLEARLY DISTINGUISHABLE FROM THE COURT OF CUSTOMS APPEALS.

The memorandum attached to the Solicitor General's brief refers specifically to the Court of Private

Land Claims, the Special Indian Court, and the Court of Claims. An examination of the statutes setting up the first two, these tribunals show that these courts were not attempted to be organized or created under Article III of the Constitution, but purely under the power of Congress to pass rules and regulations for the government of the territories of the United States.

The statute creating the Court of Private Land Claims is the Act of March 3, 1891, chapter 539, 26 Stat. at L. 854. Section 1 of that Act limits the tenure of office of the justices to December 31, 1895. Thus it could not be considered a constitutional court under Article III.

This statute was construed by this court in *United States v. Coe* (155 U. S. 76). The decision there was on a motion to dismiss for want of jurisdiction, but the motion to dismiss was denied because it was determined that the Private Land Court was a territorial court. The court says: "The case before us relates to the determination of a claim against the United States to lands situated in the territory of Arizona, and, as it was clearly within the authority of Congress to establish a court for such determination unaffected by the definitions of Article III, the question is not presented whether it was within the power of Congress to create a judicial tribunal of this character for the determination of title to property *situated in the States where the Courts of the United States, proper, are parts of the Federal System invested* with judicial power of the United States expressly conferred by the Constitution and to be expressed in correlation with the presence and jurisdiction of the several states courts and governments, citing *Hornbuckle* v. *Toombs* (18 Wall. 648, 655). (Italics ours.)

It may well be doubted whether in the light of *Liberty Warehouse* v. *Grannis* (*supra*), and other cases, this Court would now take jurisdiction under a statute which did not finally determine the ownership of land but only of the rights of the government, in reference to a claimant therefor.

Section 13 (5th) of said Act of March 3, 1891, reads "No proceeding, decree, or act under this Act shall conclude or affect the private rights of persons as between each other * * * but the proceedings, decrees and acts therein provided for shall be conclusive of all rights as between the United States and all persons claiming any interest or right in such lands."

If by the Indian Court referred to in the memorandum is meant the Act of March 1, 1889, Chapter 3, 33 Stat. at L. 783, it should be noted that the tenure of office of the judges is set at four years. This court also was undoubtedly established under the power of Congress to adopt all necessary regulations for the Government of territories, and not under Article III of the Constitution, nor under any implied power of Congress, but under the direct grant given Congress to govern the territories.

Insofar as the Court of Claims is concerned, *U. S.* v. *Klein* (13 Wall. 144) clearly sets forth the history of that court showing how when it was first organized it was not a court at all and finally after various enactments of Congress it became invested with the powers of a Federal Court including the power of giving final judgment.

The fact that the Congress has attempted to give to the Court of Claims jurisdiction in administrative or advisory matters cannot take away from that court its character as an inferior Federal Court.

This court has held that inferior courts have no jurisdiction to decide such matters and merely because the Supreme Court has never had occasion to pass upon this clearly unauthorized jurisdiction is no reason upon which to predicate a theory of the right of Congress to set up courts outside the Constitutional limitations.

IX.

EXECUTIVE INTERPRETATION OF THE ACT CREATING THE COURT OF CUSTOMS APPEALS.

For nineteen years, the United States Court of Customs Appeals has been functioning as a useful and respected part of the judicial system of the country. During that time its presiding and associate judges have been commissioned by the President, with the approval of the Department of Justice, during good behavior. One of its judges, after eighteen years of service, has been retired, under the general retirement act, and is now drawing his compensation, by approval of the Department of Justice. Another such judge now serving on the District of Columbia Court of Appeals, is eligible for retirement. If the Court of Customs Appeals be not an inferior constitutional court of the United States, then its judges are not entitled to retirement, as they were not given statutory life tenure (*James* v. *U. S.*, 202 U. S. 401), their salaries may be decreased at any time and themselves be removed from office, for partisan or other purposes. There is much doubt as to whether judges of other inferior Constitutional courts of the United States may sit with them and supply vacancies. The practical effect of such a construction is to destroy the court that Congress so carefully provided for in the act creating it.

CONCLUSION.

For the reasons given we respectfully urge that the United States Court of Customs Appeals is an inferior court of the United States, created under Art. III of the Constitution.

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Petitioner.

SAMUEL M. RICHARDSON,
Of Counsel.

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IN THE

Supreme Court of the United States

BAKELITE CORPORATION,
Petitioner,
v.
PRESIDING JUDGE AND THE ASSOCIATE JUDGES OF THE UNITED STATES COURT OF CUSTOMS APPEALS,
Respondents.

Ex Parte,

In the Matter of the Application

of

FRISCHER & CO., INC., RICHARD GANZ, doing business as RANDES IMPORTING COMPANY, TRANS-ATLANTIC WATCH COMPANY, INC., a New York Corporation, WESTERN BRIAR PIPE COMPANY, an Illinois Corporation,
Petitioners,

FOR LEAVE TO INTERVENE HEREIN IN OPPOSITION TO APPLICATION FOR THE ISSUANCE OF A WRIT OF PROHIBITION.

MOTION FOR LEAVE TO FILE PETITION TO INTERVENE, OR IN THE ALTERNATIVE, THAT THE UNDERSIGNED COUNSEL BE PERMITTED TO FILE A BRIEF AS *AMICUS CURIAE*.

Now comes the petitioners, Frischer & Co., Inc., Randes Importing Company, Transatlantic Clock & Watch Company, Inc., and the Western Briar Pipe Company, by Meyer Kraushaar, their attorney, and move for leave to file petition and brief annexed hereto in opposition to application for a writ of prohibition, or in the alternative, that the said brief may be filed as *amicus curiae* and their counsel heard in support thereof upon the oral argument.

MEYER KRAUSHAAR,
Attorney for Petitioners,
Office & Post Office Address,
No. 51 Chambers Street,
New York, N. Y.

PETITION FOR LEAVE TO INTERVENE.

To the Honorable, The Chief Justice and Associate Justices of the Supreme Court of the United States.

Come now Frischer & Co., Inc., Randes Importing Company, Transatlantic Clock & Watch Company, Inc., and Western Briar Pipe Company, and give this Honorable Court to understand and be informed:

1. That on the 16th day of December, 1925, the Bakelite Corporation and certain of its subsidiaries and customers filed a complaint with the United States Tariff Commission, complaining of the existence of alleged unfair methods of competition and unfair acts in the importation of articles into the United States tending to injure their business of manufacturing and selling articles composed of synthetic phenolic resin, form C; said complaint being wholly based upon Section 316 of the Tariff Act of September 21, 1922, 42 Stat., L. 858, U. S. C. Title 19, Sec. 176.

2. The gist of the alleged unfair methods of competition and unfair acts is alleged to have been the infringement of certain basic patents expiring by limitation on December 6, 1926, U. S. Letters Patent No. 942,700, and U. S. Letters Patent No. 942,809. It is charged in this written complaint that the Bakelite Corporation and its subsidiaries are industries efficiently and economically operated in the United States, and that the effect or tendency of such alleged infringement was to destroy or substantially injure the same.

3. The United States Tariff Commission, acting under subdivision "f" of Section 316 of said Tariff Act, there-

upon recommended to the President that there is reason to believe that such articles were being offered for entry in violation of said section, and that the President request the Secretary of the Treasury to "forbid entry of synthetic phenolic resin, of form C, and articles made wholly or in part thereof until an investigation under Section 316 of the Tariff Act, sufficient for a full presentation of the facts involved, could be completed."

4. The President thereupon on the 26th day of April, 1926, acting on the recommendation of the Commission, directed the Secretary of the Treasury to forbid such entry and the Secretary of the Treasury, complying with the order of the President, did by proclamation, order and direct that such articles be excluded from entry into the United States.

5. That thereupon pursuant to the provisions of subdivision "e" of said section, the United States Tariff Commission instituted an investigation and published notice in which it proclaimed the receipt of the complaint aforesaid and directed all persons interested to show cause at a public hearing at its office at Washington, D. C., on May 24, 1926, why the provisions of Section 316 of the Tariff Act should not be enforced and further gave notice to persons interested that they would be given an opportunity to produce evidence and be heard in reference to the subject matter of the investigation.

6. Thereupon the petitioners herein, Frischer & Co., Inc., *et al.*, complying with the direction of the Commission, filed a written answer in which they denied the material allegations of the complaint and set up affirmatively that the Bakelite Corporation and its subsidiaries and those acting in concert with them did not maintain

in the United States efficiently and economically operated industries, but on the contrary, that the Bakelite Corporation maintained and controlled a monopoly of articles made of synthetic phenolic resin, form C, and engaged in unfair trade practices heretofore condemned by Acts of Congress and interstate commerce laws.

7. That in the said answer they further charged specifically that the *alleged patent rights upon which the proceedings were based were invalid or in any event were not infringed by any of the answering respondents.*

8. The jurisdiction of the Commission was contested in two vital particulars: (a) on the ground that the Tariff Commission had no jurisdiction to pass upon the validity, construction or infringement of patent rights and that this jurisdiction was vested by law solely in the District Courts of the United States; (b) that Section 316 of the Tariff Act constitutes an unlawful delegation of legislative or judicial powers to ministerial or executive officers and was therefore unconstitutional and void.

9. Thereupon, public hearings were held in the City of Washington, D. C., at which both the attorneys for the Bakelite Corporation and the attorneys for the answering respondents participated and at which witnesses were heard on both sides, the hearings being concluded on the 12th of June, 1926, and the Commission entertained briefs.

10. That six months thereafter, on December 22, 1926, the Commission made an *ad interim* report to the President in which it recommended that the embargo or order forbidding entry above described be modified in view of the expiration of the basic letters patent above set forth, so that thereafter only such articles made of

synthetic phenolic resin, form C, be forbidden entry as are "composed of different colored sections of a phenolic condensation product joined together by applying a fusible phenolic condensation product to the sections to be joined, which fusible product has been converted to the infusible state by means of heat or heat and pressure as described in United States patent No. 1,424,738."

11. Notice of the report coming to attention of the answering respondents, a petition was presented by them in which they called the attention of the Commission to the fact that the U. S. Letters Patent No. 1,424,738 had never been litigated before the Commission and only had come to the attention of the Commission incidentally in the course of the investigation affecting the base patents, which by its terms had expired as above provided, and in view of these facts the petitioners asked that the proceedings either be entirely dismissed or be re-opened in order that proof might be taken in connection with the U. S. Letters Patent No. 1,424,738, reserving all rights in connection with the constitutional and jurisdictional questions raised at the outset of the proceedings.

12. Thereupon, the Commission ordered the institution of a new proceeding in connection with the investigation of the alleged infringement of U. S. Letters Patent No. 1,424,738, and counsel for the Bakelite Corporation as well as the answering respondents were again heard at length and testimony taken and further briefs again submitted.

13. On May 25, 1927, the respondents received a copy of the report of the United States Tariff Commission containing alleged findings and recommendations to the President of the United States.

14. The Tariff Commission is composed of six members appointed under Chapter 463 of the Act of September 8th, 1916, Sections 91 to 106, of Chapter 2, Title 19, U. S. C. A. By the provisions of this act, the President is authorized to appoint the membership of this Commission with the advice and consent of the Senate, "not more than three of whom shall be members of the same political party." In making said appointments, "members of the different political parties shall alternate as nearly as may be practicable." No provisions are made in the act for the number intended to constitute a quorum, but obviously it was the intention of Congress that the Tariff Commission shall consist of a non-partisan fact finding commission possessing quasi-judicial powers. The so-called report above described was signed by only three members of the Commission and not by a majority thereof, the fourth member, Commissioner Costigan, writing a dissenting opinion as follows:

> "Dissent from the foregoing opinion, findings and recommendations of Commissioners Marvin, Dennis, and Brossard must be recorded. There are persuasive reasons for concluding that Section 316 of the Tariff Act of 1922 was not designed, as the foregoing findings in effect hold, to enlarge patent monopolies through the aid of embargoes in cases where, as here, the validity and infringement of the patents in question have been denied and duly put in issue in the Tariff Commission's investigation, and it develops that such validity has not been upheld by the courts. The Tariff Commission is ill-equipped to give interested parties an adequate day in court in technical patent causes, and grave doubt must attend any construction of the present law which invests that Commission with jurisdiction, similar to that conferred on District Courts of the United States, to try and

> determine such contested causes. Otherwise stated, there is scant reason to conclude that the Congress, in approving Section 316 of the Tariff Act of 1922, empowered or intended to empower the Tariff Commission, as held in the foregoing opinion and findings, to try and determine unresolved issues with respect to the validity, or invalidity and the infringement or non-infringement of United States patents; or, as affirmed in such opinion and findings, to assume the validity, though expressly challenged, of United States patents in the absence of any controlling decision with respect to such validity by a court of competent jurisdiction. If the specified findings are erroneous, the ensuing recommendations, numbered 1 and 2, of Commissioners Marvin, Dennis, and Brossard, of exclusion of goods from entry into the United States must be rejected.
>
> Furthermore, it is my judgment and finding that the present investigation fails to establish one essential prerequisite of the granting of the relief sought by complainants, namely, that the United States industry which produces synthetic phenolic resin of form C, and articles manufactured wholly or in part thereof, was during the Tariff Commission's investigation or now is economically operated.
>
> It is submitted that upon the present record the temporary orders of the Secretary of the Treasury of April 26, 1926, and December 7, 1926, forbidding entry of the articles therein mentioned pending the completion of this investigation, should be revoked, and the requests of the complainants for further action in their behalf under Section 316 should be denied."

The fifth member of the Commission, to wit, Commissioner Dixon, announced in a short sentence that he concurred with Commissioned Costigan in holding that the

Commission was without jurisdiction to pass upon contested patent questions, but nevertheless concurred in so much of the report signed by the three members, which held in effect that articles made wholly or in part of synthetic phenolic resin, form C, be excluded from entering the United States unless "it is clearly and unmistakably shown by means of a distinguishing mark, name, inscription, or label placed upon said articles or attached thereto, that said articles are not made from synthetic phenolic resin, form C, manufactured by the Bakelite Corporation, or unless said articles are otherwise reasonably distinguished so as to prevent confusion between the imported and the domestic articles on the part of the purchasing public."

15. It is to be noted at this time that the prevailing report in question contains a concession that no importer had misbranded his commodity and that there was no charge of misbranding, but the prevailing report nevertheless held and recommended that the articles be excluded from entry on the ground that the same constitutes an infringement.

16. The prevailing report held that the Commission had jurisdiction to pass upon questions affecting patent rights and infringements and that with respect to such articles thereafter to be imported, which had heretofore been covered by the expired patents that they be excluded unless they are marked in the manner above provided.

17. In the meantime, and while these proceedings were pending, and before the report to the President was made, the importers under the provisions of subdivision "f" of Section 316 secured a permit from the Secretary of the Treasury to permit entry of goods im-

ported, under bonds; the form and penalties were fixed by the Secretary of the Treasury and such importations have been continuous and uninterrupted since that time.

18. The effect of the findings of the three members of the Commission, if the same are subsequently adjudicated to be valid and binding upon the president, will be to produce a forfeiture of said bonds and involve the importers in large and substantial damages, the amount of which at this time cannot be fully ascertained.

19. Acting in pursuance of the provisions of subdivision "c" of said section, an appeal was then taken by the importers to the United States Court of Customs Appeals in the manner as such appeals are taken from decisions of the United States Board of General Appraisers (now the United States Customs Court), upon thirty-five written assignments of error, the salient features of which are:

> (a) The section of the act in question is unconstitutional for the reason that the same constitutes an unlawful delegation of legislative power to ministerial and executive officers.
>
> (b) That the Tariff Commission was without jurisdiction to pass upon and adjudicate the scope, validity, construction or infringement of contested letters patent.
>
> (c) That the complaining industry is a monopoly and is not efficiently and economically operated and maintained.
>
> (d) That as a matter of fact such importations are not an infringement of such patent rights.
>
> (e) That there were no unfair methods of competition or unfair acts in the importation of the articles in question.

(f) That the Commission refused to receive competent evidence and received incompetent proof, which in effect resulted in unfair hearing to the importers.

(g) That the report itself is null and void, in that it was not signed by a majority of the members of the Commission as intended by law, it being signed by only three members thereof.

20. That thereupon a record containing more than 1,000 pages was printed at a large expense to the importers and that the case thereupon was ready to be briefed and argued.

21. Before the time for the filing of briefs had expired, counsel for the Bakelite Corporation thereupon made application to the United States Court of Customs Appeals to dismiss the appeal, contending that so much of the statute which gave the importers a right of appeal was unconstitutional and void for the reason that the matter in question was not a "case" or "controversy" within the meaning of Section 2 of Article III, of the United States Constitution, and that Congress could not constitutionally delegate the power of review to an inferior court established under the constitution, and that the United States Court of Customs Appeals was such an inferior court. The plain purpose of that proceeding was to prevent the court from reviewing the acts of the Tariff Commission and thus to secure without a review the benefits of the statute and to destroy the business of the importers.

22. Bearing in mind that the importers had themselves contested the validity of the substantive portions of the statute, this court will at once note that the importers were placed in an anomalous position in having to defend

the constitutionality of the measure in order to secure the right of a court review.

23. Before the United States Court of Customs Appeals, your petitioners contended and still contend that the right of appeal created by statute is an integral portion thereof, the destruction and nullification of which would of necessity destroy all the remaining provisions of Section 316. It was maintained that Congress never intended to place so great an economic weapon as the embargo in the hands of the executive department of the Government without the check or guidance of an impartial court of law. To hold that one part of the statute may be given life whereas the other must be excised would plainly defeat the manifest purpose of Congress. Hence the statute must be so construed if possible as to render each and every one of its provisions constitutional, valid and enforceable, as otherwise the entire legislation in question must be struck down. *All parties concede that the United States Court of Customs Appeals is an inferior court established under and in pursuance of Section 1 of Article III of the Constitution of the United States, and that unless the matter in question was a "case" or "controversy" within the meaning of Section 2 of Article III that that court would have no jurisdiction.* Your petitioners contend that the matter in question is a "case" or "controversy" instituted by the Tariff Commission on the one side against the importers on the other, and that the subject matter involves a matter of public right upon which the judicial power of the government is capable of acting.

24. That in the Court of Customs Appeals the importers or appellants made a counter motion to strike out

the appearance of the Bakelite Corporation on the ground that it was not a party to the record and that it had been inadvertently brought in.

25. On the 25th of May, 1928, the United States Court of Customs Appeals made an order denying the motion of the Bakelite Corporation to dismiss for want of jurisdiction and overruled your petitioners' motion to strike out the appearance of Barnes, McKenna & Halstead for the appellees, rendering an opinion reported in 16 Ct. Cust. Appls. , 53 Treasury Decisions , T. D. 42827, which has been submitted to this court annexed to the brief for the Bakelite Corporation in this proceeding.

26. That thereupon the Bakelite Corporation filed a petition for certiorari which is still pending, at No. 389, upon which a brief in opposition has been filed, in which it is contended that the petition for certiorari is premature and cannot be entertained by this court at this time. This court has nevertheless entertained a petition for a writ of prohibition and has directed the Presiding Judge and Associate Judges of the United States Court of Customs Appeals to file a return of their proceedings in printed form returnable on the 29th day of October, 1928.

27. It is at once manifest that the rights and property interests of your petitioners are now greatly jeopardized by these proceedings and if these proceedings can be successfully maintained and a writ of prohibition issued your petitioners will be deprived of a right expressly granted by statute to them to appeal and have the matter reviewed in a high court of justice and that if such appeal is in that manner frustrated, your petitioners will suffer great and irreparable damage and injury.

Wherefore, your petitioners respectfully pray that they may be permitted to intervene and become parties to this proceeding and that this court permit their counsel to be heard in oral argument, and that in any event that this court entertain the annexed brief, either as parties to this proceeding or as *amicus curiae*, in support of this application and in opposition to the issuance of a writ of prohibition.

Respectfully submitted,

Meyer Kraushaar,
Attorney for Petitioners.

I have read the foregoing petition by me subscribed and the facts therein stated are true to the best of my information and belief.

Subscribed and sworn to before me,
this 25 day of October, 1928.

Meyer Kraushaar

FLO HUBER
NOTARY PUBLIC, [illegible] County
N. Y. Co. Clk's No. [illegible], Reg. No. [illegible]
Kings Co. Clerk's No. [illegible], Reg. No. [illegible]
Queens Co. Clerk's No. [illegible], Reg. No. [illegible]
Bronx Co. Clk's No. [illegible], Reg. No. [illegible]
Certificate filed in [illegible] Co.
My Commission expires [illegible]

BRIEF IN SUPPORT OF APPLICATION TO INTERVENE AND IN OPPOSITION TO PETITION FOR WRIT OF PROHIBITION.

Propriety of Granting Application to Intervene.

This court *In the Matter of the Petition of The Indiana Transportation Company for Writ of Prohibition*, 242 U. S. 281, has laid down the rule that the essential party respondents in a proceeding such as this are the judges against whom the rule is issued, but that when the return to the rule is made, either by the authority of the judges "or because of their interest in the result, or as friends of the court, the persons to be adversely affected by the granting of the relief prayed may be heard to sustain the sufficiency of the return when that subject arises for consideration."

Since it is manifest from the foregoing petition that the real parties to be affected by an adverse result are the importers, it is respectfully suggested that this court permit them to be made parties to this cause, or in the alternative, that their counsel be heard as a friend of the court, and if so heard, that the following brief in opposition to the issuance of a writ be considered by this court.

Statement.

At this writing we have not before us a copy of the return of the Honorable Presiding Judge and Associate Judges of the United States Court of Customs Appeals, but we may assume since it is a matter of record, that the return will contain the essential facts and circumstances set out in the foregoing petition.

It will be noted that the proceedings were begun before the Tariff Commission upon the complaint of the Bakelite Corporation. There is no express warrant in the statute—Section 316 of the Tariff Act—for the complaining person to be deemed a party to the proceedings. The statute merely authorizes third parties to complain, but the Commission may act upon its own initiative.

Representation before the Commission has nevertheless been accorded the complainants. The statute does not expressly authorize it. It must therefore be assumed that the counsel representing them appear before the Commission purely as a matter of courtesy. On the other hand, the importers are expressly accorded the right to appear and be heard. No appeal by the statute is given to the complaining parties, but such a right of appeal is given to the "*importer or consignee of such articles*".

The right of the Bakelite Corporation to appear in the United States Court of Customs Appeals was challenged by the importers or consignees, but that application was overruled by the same order by which the jurisdiction of the court to entertain an appeal from the findings of the Tariff Commission was sustained. While it is therefore clear that the Bakelite Corporation is not the proper party to institute this proceeding and thus to protest against the assumption of jurisdiction by the United States Court of Customs Appeals, we do not seriously press the point, as we believe that it is to the interest of all concerned that the question be set at rest at the earliest practicable moment. To refuse to face the question now may only mean to saddle the burden of protracted litigation which may ultimately prove abortive upon the real parties in interest.

The complainants before the Tariff Commission took full advantage of the benefits of Section 316 of the Tariff

Act and now adopt the inconsistent position of maintaining that an integral, substantial and organic portion of the statute which gave this proceeding life is null, void and unconstitutional and nevertheless maintain that this court may excise from its provisions this important member and yet permit the body of the statute to stand unaffected. There is nothing suggestive in their brief of the importance of the right of appeal granted by Section 316 of the Tariff Act to the importers or consignees of the articles affected thereby, but it is plain that this section of the Tariff Act would never have been passed by Congress unless this important right was regarded as essential to its validity. (See Appendix containing extract from Senatorial debate.)

It is contended, notwithstanding the statute in so far as it grants an appeal to the courts is void because the matter before the Tariff Commission was not a "case" or "controversy" under Section 2 of Article III of the Constitution of the United States and therefore Congress could not have competently vested jurisdiction in the United States Court of Customs Appeals, because that court is an inferior court established under Section 1 of Article III. The jurisdiction of all federal courts is limited to "cases" or "controversies". We concede that the United States Court of Customs Appeals is an inferior court established under Section 1 of Article III of the Constitution. We have never doubted this. But if doubt can be entertained, in our judgment the opinion of Judge Bland below clearly and cogently resolves that question in favor of the contention that that court is such an inferior court. We maintain, however, that the cause before the Tariff Commission and the United States Court of Customs Appeals is a "case" or "controversy" within the meaning of the constitutional limitation above described, because to construe the statute otherwise and to hold that the statute requires that court to act in an administrative or advisory capacity would mean not only to strike down the alleged objectionable right of appeal but to render unconstitutional and void in each and every one of its other aspects the provisions of Section 316 of the Tariff Act, and that by applying the well settled principle that if the statute is possible of another interpretation of a constitutional character such interpretation must be adopted, we claim that it is possible so to construe the statute as to render it constitutional in all its parts, as we shall hereafter demonstrate. If, on the other hand we err in this, in the interest of justice and fair play, we ask this court to so construe the statute as to leave no room for doubt that if the objectionable feature is unconstitutional and void *the whole statute must fail and be rendered entirely inoperative.*

ARGUMENT.

POINT I.

The investigation under Section 316 of the Tariff Act is a "case" or "controversy".

The provisions of Section 316 of the Tariff Act are set out at length in the brief for the petitioner at pages 32-34. It may also be found in the appendix hereto.

By this statute a new substantive right was created and a novel procedure adopted for the enforcement of that right. The substantive right was to declare unlawful the importation or sale by any owner, importer or consignee of any articles imported from abroad by any unfair methods of competition or unfair acts, the tendency of which is to destroy or substantially injure or prevent the establishment of an industry efficiently and economically operated in the United States, or to in any wise monopolize trade in such article. To prevent such unlawful methods, two remedies are provided: (1) to increase the duty on such imported articles to the extent of not more than 50% ad valorem in order to offset any wrong perpetrated, or (2) in extreme cases, to exclude them all together from entry.

In order that the taxing power or the power of embargo might not be abused to the detriment of innocent parties, a machinery was set up by the statute by which such a wrong, much graver than the original evil might be avoided. There is provided a public hearing before a so-called impartial, non-partisan, fact-finding body, to wit, the United States Tariff Commission. An appeal is provided the importer or consignee from the findings of that body to a high court already established by Congress, and that court is clothed with power to review the findings and declare the law, and if this were not enough, in order to insure against error, a discretionary review by this court is expressly provided for by the grant of jurisdiction to review by certiorari. But it is said that the Tariff Commission is purely administrative and possesses no judicial power; the President of the United States is not bound by their findings; that he may ignore these findings at will and notwithstanding that the Commission may have held that the fact may not constitute a violation of the statute, the President may hold otherwise and may overrule the Commission. Indeed, the counsel for the Bakelite Corporation goes further and maintains that the judgment of the United States Court of Customs Appeal declared final by statute is not even binding upon the president and is only advisory in character.

A cursory examination of the statute might lend support to this view. Indeed, Senator Walsh of Montana condemned the statute as unconstitutional on that express ground, saying:

> "I need not say that upon principles of the law frankly conceded upon the other side of the Chamber this section can not possibly be sustained as a constitutional exercise of the power of Congress." (Congressional Record, 67th Congress, 2d Session, August 11, 1922, p. 11241).
>
> "I have had no opportunity to examine the statute to which the Senator from North Dakota makes reference. In some of its features, at least, it is easily sustained by the case of Field against Clark. I do not undertake to state, however, that it could be sustained by that decision nor that it could be sustained at all. Indeed, in the case of

> Field against Clark the Supreme Court referred to many statutes which had been passed which seemed to confer upon the President discretionary power. They merely so remarked, without undertaking to say that upon an inquiry into any particular one of those statutes it might not be found to be violative of the Constitution. That seems to be no answer at all to the argument." (Congressional Record, 67th Congress, 2d Session, August 11, 1922, p. 11243).

The question of the right of Congress to abdicate its legislative functions in favor of the executive department of the government has been so often before this court that it would seem most unnecessary for counsel to brief the question. We content ourselves, however, with drawing this court's attention to the most recent case of *J. W. Hampton, Jr. & Co. v. United States*, 48 Sup. Ct. 348, in which the learned Chief Justice cites all the pronouncements of this court in the interpretation of the principle and holds constitutional the provisions of Section 315 of the very same act here under review. In that case this court again sustains the principle that Congress cannot constitutionally delegate purely legislative functions to ministerial officers, but that the delegation of discretion to such officers "to make public regulations interpreting a statute and directing the details of its execution, even to the extent of providing for penalizing a breach of such regulations" *within defined limits* is not unconstitutional.

Nor is it unconstitutional, as in *Marshall Field & Co. v. Clark*, 143 U. S. 649, 12 Sup. Ct. 495, for Congress to delegate to the president the power as *its agent to ascertain and declare the event upon which its expressed will was to take effect*. To say that the president, when such events has been ascertained and declared, might disregard the legislative command and say that the statute is not to operate or that the legislative will is not to become effective or to vest in the president unrestrained discretion without limitation, to secure or not to secure the effect of legislation, or to make regulations binding or not binding in his discretion would be clearly a delegation of purely legislative functions to the president.

In *Marshall Field & Co.* v. *Clark*, (*supra*), this court had before it the construction of the Tariff Act of June 10, 1890. The particular provision of this statute which was attacked was Section 3, which was passed with a view to securing reciprocal trade with countries producing certain articles and the president was given the power *when he may deem certain* imports to be reciprocally unequal, and unreasonable, to suspend by a proclamation to that effect the provisions of the act relating to free introduction of certain articles and during the period of such suspension to impose certain fixed duties which may be levied by the United States.

The counsel for the appellant argued that the language of the statute, *viz.*, the phrase the "president may deem," invested the president with unrestrained discretion in the premises and gave him the right to say whether that law may be suspended or not at will. Indeed, the minority opinion by Mr. Justice Lamar, concurred in by Mr. Justice Fuller, adopted this view. Said Mr. Justice Fuller:

> "It goes further than that and deputes to the president the power to suspend another section in the same act whenever 'he may deem' the action of any foreign nation producing and exporting the articles named in that section to be 'reciprocally unequal and unreasonable'; and it further deputes

> to him the power to continue that suspension and to impose revenue duties on the articles named 'for such time as he may deem just.' This certainly extends to the executive the exercise of those discretionary powers which the constitution has vested in the law-making department. It unquestionably vests in the president the power to regulate our commerce with all foreign nations which produce sugar, tea, coffee, molasses, hides, or any of such articles; and to impose revenue duties upon them for a length of time limited solely by his discretion, whenever he deems the revenue system or policy of any nation in which those articles are produced reciprocally unequal and unreasonable in its operation upon the products of this country.
>
> These features of this section are, in our opinion, in palpable violation of the constitution of the United States, and serve to distinguish it from the legislative precedents which are relied upon to sustain it, as the practice of the government."

The majority opinion, however, adopted the view that there was nothing discretionary in the statute. Mr. Justice Harlan thus wrote:

> "*Nothing involving the expediency or the just operation of such legislation was left to the determination of the president.* The words 'he may deem' in the third section, of course implied that the president would examine the commercial regulations of other countries producing and exporting sugar, molasses, coffee, tea, and hides, and form a judgment as to whether they were reciprocally equal and reasonable, or the contrary, in their effect upon American products. But when he ascertained the fact that duties and exactions reciprocally unequal and unreasonable were imposed upon the agricultural or other products of the United States by a country producing and exporting sugar, molasses, coffee, tea, or hides, it became his duty

> to issue a proclamation declaring the suspension, as to that country, which congress had determined should occur. He had no discretion in the premises except in respect to the duration of the suspension so ordered. But that related only to the enforcement of the policy established by congress. As the suspension was absolutely requested when the president ascertained the existence of a particular fact, it cannot be said that in ascertaining that fact, and in issuing his proclamation, in obedience to the legislative will, he exercised the function of making laws. Legislative power was exercised when congress declared that the suspension should take effect upon a named contingency. What the president was required to do was simply in execution of the act of congress. It was not the making of the law. He was the mere agent of the law-making department to ascertain and declare the event upon which its expressed will was to take effect. It was a part of the law itself, as it left the hands of Congress, that the provisions, full and complete in themselves, permitting the free introduction of sugar, molasses, coffee, tea and hides, from particular countries, should be suspended in a given contingency, and that in case of such suspension certain duties should be imposed." (Italics ours.)

Nothing is better settled in law than that when a statute is capable of two constructions, one which would render it constitutional, and the other unconstitutional, the one which would render it constitutional must prevail. Another principle to be borne in mind in statutory construction is that where a statute confers power to act or clothes a public body or officers with power to perform acts which concern the public interest or the rights of individuals, although the language is permissive merely, it will nevertheless be construed as imposing duties rather than conferring privileges and will therefore be regarded as mandatory (36 *Cyc.* 1159). So the general rule is that the word "may" ordinarily used in a statute is permissive only, and operates to confer discretion. While the words "shall" and "must" are imperative operating to impose a duty, which must be enforced. These words, however, are constantly used in statutes without regard to their literal meaning.

> *Fields* v. *U. S.*, 27 App. Cases 433; certiorari denied, 205 U. S. 292; 27 Sup. Ct. 543.

Thus the word "may" will be construed to be mandatory whenever the public or individuals have a claim *de jure* that the power conferred should be exercised or whenever something is directed to be done for the sake of justice or the public good. So the word "shall" is construed as merely permissive where no public benefit or private right requires it to be given an imperative meaning (see 36 *Cyc.* 1160-1161).

In *Brian* v. *Moore*, 81 Ind. 9, at page 12, the Court held that the phrase "become satisfied" as used in the statute providing, that if the Board of Commissioners *became satisfied* that a proposed drain is a public utility they shall appoint appraisers who shall assess the land affected, means that if the Board is convinced or the Board finds that the work contemplated is a public utility, they shall appoint appraisers. The statute does *not confer discretionary powers*, but *imposes a judicial duty on the Board to hear* and determine the question of public utility on the contemplated work.

In *State* v. *Cohen*, 73 N. H. 543; 63 Atl. 928, involving a statute granting the city officials the right to license persons "deemed by them to be dealers in junk, etc.," the

Court adopted the theory that such statute should be construed as merely granting the right to exercise a reasonable discretion in determining who were "suitable" persons, and not as granting an arbitrary and uncontrolled power of discriminating between applications for licenses to deal in junk. In holding that that statute was not unconstitutional, the Court reasoned as follows:

> "The defendants' objection to the statute is not so much on account of absence of power in the legislature to enact any statute on the subject, as it is on account of the provisions of this particular statute. He says that it confers upon the Mayor and Alderman of Cities and the Selectmen of Towns authority arbitrarily to determine who shall engage in the business and where the businesses shall be carried on. If this were the true interpretation it might be that the statute was unconstitutional. But the defendant is in error here, also * * *. The theory on which the statute was framed was that the protection which it was thought the public required would be obtained by allowing 'suitable persons' only to engage in the business, and having it definitely known where the business was to be transacted. To carry the theory into effect, it was necessary to clothe someone with authority to determine who were 'suitable persons,' persons possessing the requisite sobriety, integrity and respect for the welfare of the community to be safely intrusted with the control of a business having such possibilities of danger to the safety and welfare of the public. The legislature delegated the performance of this duty to the mayor and aldermen and selectmen. These officers were not to license persons generally or such persons as they saw fit, but only 'suitable persons.' There is nothing in the statute having the least tendency to show an intention that there was to be any discrimination among 'suitable persons' or

> that any persons were to be adjudged unsuitable excepting those who, in the conduct of the business, would probably defeat or attempt to defeat, the purpose of the legislature in requiring a license. All suitable persons who applied were to have licenses. The provision was not intended as a grant or arbitrary power, but only as the imposition of a duty upon those officers, to be performed by an impartial exercise of a reasonable discretion. There can be no doubt of the legislature's power to delegate the duty to these officers, and by doing so, they violated no provision of the Constitution."

In this proceeding, to permit the statute to be so construed that the president may disregard the findings of the Tariff Commission and its recommendations, and make his own findings in the premises as he may deem just and that the president may disregard the judgment of this Court, reversing the findings of the Tariff Commission, or confirming them, as the case may be, would render this statute inoperative, as it would apparently violate the principle that Congress had no power to delegate such power to the president.

With these principles in mind, let us again examine the statute to see whether it is possible to so construe it as to render effective the intent of Congress and at the same time free it of any imputation of illegality because of conflict with organic law. It was the manifest intent of Congress not to protect any particular person from unfair methods of competition, but to protect American industries and their public aspect from being undermined from such methods of importation. This policy was not entirely new.

In the Act of September 26, 1914, 38 Statutes at Large, 717, Sections 41, 45, *et seq.*, Title 15 U. S. C. A. the Federal Trade Commission was established. This Commission is composed of five members appointed by the president with the advice and consent of the Senate. By Section 45 the Federal Trade Commission is given the power and directed to prevent persons, partnerships or corporations, except banks and common carriers, subject to acts to regulate commerce, from "*using unfair methods of competition in domestic commerce.*" Under the provision of that law a comprehensive procedure is set up whereby the Trade Commission may of its *own initiative*, or *upon a complaint filed* against an offender, after first affording him an opportunity to be heard, make a report containing the necessary findings of fact, and an order requiring said person, partnership or corporation "to cease and desist from using such unfair methods of competition." If the offender fails or neglects to obey the Commission, the Commission may apply to the Circuit Court of Appeals of the United States, within any Circuit where the method of competition in question is used, for the enforcement of this order. If the Court, upon review, finds the findings of the Commission just, it has the power to make a final judgment directing the enforcement thereof.

A writ of certiorari may be granted to this court.

Procedure is also provided for an appeal from an order of the Trade Commission by a party aggrieved.

It is therefore similar in practically all of its functions to that of the Tariff Commission, except that the Tariff Commission *directs its activities against importers*, whereas the Federal Trade Commission is limited in its power to domestic commerce.

The Federal Trade Commission has been held not to be a court, and it exercises administrative, not judicial, power (*Eastman Kodak Co. v. Federal Trade Commis-*

sion, 7 Fed. (2nd) 994, affirmed *Federal Trade Commission* v. *Eastman Kodak Co.*, 47 Sup. Ct. 688; *American Tobacco Co.* v. *Federal Trade Commission*, 9 Fed. (2nd) 570, affirmed 47 Sup. Ct. 663).

Thus it has been held that Congress, in failing to define the term "unfair methods of competition," left the question of ultimate determination as to the meaning of the phraseology to the court (*Federal Trade Commission* v. *Gratz*, 253 U. S. 421, 40 Sup. Ct. 572; *Sears Roebuck* v. *Federal Trade Commission*, 258 Fed. 307; *Federal Trade Commission* v. *Beechnut Packing Co.*, 257 U. S. 441, 42 Sup. Ct. 150).

In *Federal Trade Commission* v. *Eastman Kodak Co.*, 47 Sup. Ct. 688, at page 689, this Court thus defined the power of the Federal Trade Commission on a writ of certiorari reviewing the judgment of the Circuit Court of Appeals for the Second Circuit:

> "The proceeding before the Commission was instituted under Section 5 of the Federal Trade Commission Act, and its authority did not go beyond the provisions of that section. By these the Commission is empowered to prevent the using of 'unfair methods of competition' in interstate and foreign commerce, and, if, it finds that 'any unfair method of competition'' is being used, to issue an order requiring the offender 'to cease and desist from using such method of competition.' The Commission exercises only the administrative functions delegated to it by the Act, not judicial powers. National Harness, etc., Association v. Federal Trade Commission (C. C. A.), 268 F. 705, 707; Chamber of Commerce v. Federal Trade Commission (C. C. A.), 280 F. 45, 48. It has not been delegated the authority of a court of equity. And a Circuit Court of Appeals on a petition to review its order is limited to the question whether or not

> it has properly exercised the administrative authority given it by the Act, and may not sustain or award relief beyond the authority of the Commission; such review being appellate and revisory merely, and not an exercise of original jurisdiction by the court itself."

The provisions of Section 316 of the Tariff Act are clearly modeled after the provisions of the act establishing and creating the Federal Trade Commission.

The mere fact, therefore, that the Tariff Commission operates in an administrative and not in a strictly judicial capacity does not of itself necessarily prevent a court from reviewing its action in an appellate capacity.

Prior to May 28, 1926, the United States Board of General Appraisers, from which appeals were expressly allowed by statute to the United States Court of Customs Appeals, was regarded in a sense as an administrative body, although exercising practically judicial functions. The members of the Board were regarded as officers of the Treasury Department, (1894) 21 *Op. Atty. Gen.* 85; *Waite* v. *Macy*, 246 U. S. 606, 31 Sup. Ct., p. 395. Its members were removable by the president without impeachment in Congress. *Erhart* v. *Ballin*, 150 Fed. 529. By Chapter 411 of Act of May 28, 1926, Sec. 1, 44 Stat. 669, they are now called "United States Customs Court" and the members are known as the "Chief Justices" and "Associate Justices." This act was passed because the name "Board of General Appraisers" was in fact a misnomer. They exercised practically only judicial functions and were hampered in its commissions to take depositions abroad, and because they were called a board and not a court, it was not regarded abroad as courts but as *officials* of lesser dignity.

It is not a constitutional court under Section 1, Article III, of the constitution, because members do not hold their offices during good behavior, but are removable by the act of the president for cause. They must therefore be regarded as administrative tribunals with powers of a court of limited jurisdiction.

> *Stone* v. *Whitridge*, 129 Fed. 33;
> *Marine* v. *Lyon*, 65 Fed. 992;
> *In re Van Blankenstein, et al.*, 56 Fed. 474;
> *Robertson* v. *Boff*, 285 Fed. 911.

Nowhere do we find any decision challenging the power of the Customs Court of Appeals to review the decisions of the Board of General Appraisers, on the ground that they are mere administrative officers, *and indeed such reviews have been entertained in the court by certiorari.*

> *United States* v. *Klingenberg*, 153 U. S. 93; 14 Sup. Ct. 790;
> *United States* v. *Passavant*, 169 U. S. 16; 18 Sup. Ct. 219;
> *United States* v. *Salambier*, 170 U. S. 621; 18 Sup. Ct. 771.

Attention of this Court is also called to the Revenue Act of 1926 which provides for a review of the decisions of the Board of Tax Appeals by the several United States Circuit Court of Appeals, and by the Court of Appeals of the District of Columbia—the residence of the taxpayer—in general, determining the venue. Provision for such review is set forth in Sections 1001, 1002, 1003 and 1004, of the Revenue Act, 44 Stat., Part II, pp. 109, 110), as follows:

"Sec. 1001. (a) The decision of the Board rendered after the enactment of the Act (except as provided in subdivision (j) of section 283 and in subdivision (h) of section 318) may be reviewed by a Circuit Court of Appeals, or the Court of Appeals of the District of Columbia, as hereinafter provided, if a petition for such review is filed by either the Commissioner or the taxpayer within six months after the decision is rendered.

(b) Such courts are authorized to adopt rules for the filing of such petition, the preparation of the record for review, and the conduct of proceedings upon such review and, until the adoption of such rules, the rules of such courts relating to appellate proceedings upon a writ of error, so far as applicable, shall govern.

(c) Despite the provisions of sections 274 and 308, such review shall not operate as a stay of assessment or collection of any portion of the amount of the deficiency determined by the Board unless a petition for review in respect of such portion is filed by the taxpayer, and then only if the taxpayer (1) on or before the time his petition for review is filed (and in any event before the expiration of six months after the decision of the Board is rendered) has filed with the Board a bond in a sum fixed by the Board not exceeding double the amount of the portion of the deficiency in respect of which the petition for review is filed, and with surety approved by the Board, conditioned upon the payment of the deficiency as finally determined, together with any interest additional amounts, or additions to the tax provided for by law or, (2) has filed a jeopardy bond under Title III or Title III of the Revenue Act of 1914 or of this act. * * *

> Sec. 1003. (a) The Circuit Courts of Appeals and the Court of Appeals of the District of Columbia shall have exclusive jurisdiction to review the decisions of the Board (except as provided in section 239 of the Judicial Code, as amended); and the judgment of any such court shall be final, except that it shall be subject to review by the Supreme Court of the United States upon certiorari, in the manner provided in section 240 of the Judicial Code, as amended.
>
> (b) Upon such review, such courts shall have power to affirm or, if the decision of the Board is not in accordance with law, to modify or to reverse the decision of the Board, with or without remanding the case for a rehearing, as justice may require.
>
> Sec. 1004. (a) The Circuit Courts of Appeals, the Court of Appeals of the District of Columbia and the Supreme Court shall have power to impose damages in any case where the decision of the Board is affirmed and it appears that the petition was filed merely for delay."

The decisions of the Board of Tax Appeals, unless appealed from, become final in accordance with the provision of Section 1005 of the Revenue Act of 1926 (44 Stat., 110). The decisions of the Board of Tax Appeals are not only final by legislative declaration, but are final in fact, as they bind, in the absence of an appeal, both the taxpayer and the Commissioner of Internal Revenue as the representative of the Government of the United States.

In the case of *Avery* v. *The Commissioner of Internal Revenue*, 22 Fed. (2d) 6, the Court observes:

> "The first question to be considered is our jurisdiction to review a decision of the Board of Tax

> Appeals. The board was created by title 9 of the revenue act of 1924 and taxpayers were given the right to appeal to the board from decisions of the Commissioner of Internal Revenue determining a deficiency of taxes. After an adverse decision by the board the taxpayer *had no further remedy than to pay the taxes and sue to recover them*, the same as from an adverse decision of the commissioner, and by the statute creating it, section 900 (g), the findings of the board were made prima facie evidence of the facts therein stated in any suit or proceeding by the taxpayer. The board was continued as an independent agency in the executive branch of the Government by the revenue act of 1926, and by section 1003 of the said act the Circuit Court of Appeals were given jurisdiction to review its decisions.
>
> * * * * * * *
>
> It was undoubtedly the intention of Congress to create an independent board of experts to decide impartially between the Government and the taxpayer with the right to a final determination of the questions presented in a regularly constituted court before payment of the tax. It is consistent with that intention to say that it was not contemplated that the Courts of Appeals should be burdened with reviewing the mass of evidence usually submitted before a board charged with the duty of considering technical details."

The Court then proceeded to decide the case on the merits, from which it is evident that the Court was of the opinion that its jurisdiction had properly been invoked, and that it regarded the decision of the Board of Tax Appeals as a final judgment, thus constituting it a "case" or "controversy."

It is thus manifest that the mere fact that Congress has granted jurisdiction to a court to review the act of an administrative body exercising judicial functions is not in and of itself objectionable. The test upon which such jurisdictions may be obtained is whether or not the matter litigated is a "case" or "controversy" within the meaning of the constitution.

By Chapter 74, Section 9, 27 Statutes 434, an appeal is given to any aggrieved party from the Commissioner of Patents refusing a patent, to the Court of Appeals of the District of Columbia.

In *United States ex rel.* v. *Duell*, 172 U. S. 576; 19 Sup. Ct. 286, Northall applied for a patent. Bernardin also applied for a patent to the Commissioner of Patents on the same invention. The Commissioner decided on priority in favor of Bernardin. Northall appealed to the Court of Appeals of the District of Columbia. That court awarded Northall priority and reversed the Commissioner's decision. Bernardin, notwithstanding, applied to the Commissioner to issue the patent to him, and tendered the final fee, but the Commissioner refused to do this in view of the decision of the Court of Appeals, which had been duly certified to him. Bernardin then applied to the Supreme Court of the District of Columbia for a mandamus to compel the Commissioner to issue the patent in accordance with his prior decision, on the ground that the statute providing for an appeal was unconstitutional, and the judgment of the Court of Appeals void for want of jurisdiction. The application was denied and Bernardin appealed to the Court of Appeals, which affirmed the judgment. The case was thereupon brought to this Court on a writ of error. This Court thus wrote:

> "Doubtless, as was said in Murray v. Land Co., 18 How. 284, congress cannot bring under the judicial power a matter which, from its nature, is not a subject for judicial determination; but at the

> same time, as Mr. Justice Curtis, delivering the opinion of the court, further observed, 'There are matters involving public rights, which may be presented in such form that the judicial power is capable of acting on them, and which are susceptible of judicial determination, but which congress may or may not bring within the cognizance of the courts of the United States, as it may deem proper.' The instances in which this has been done are numerous, and many of them are referred to in Fong Ye Ting v. U. S. 149 U. S. 714, 715, 728, 13 Sup. Ct. 1016."
>
> * * * * * * * * *
>
> "As one of the instrumentalities designated by congress in execution of the power granted, the office of commissioner of patents was created; and though he is an executive officer, generally speaking matters in the disposal of which he exercises functions judicial in their nature may properly be brought within the cognizance of the courts.
>
> Now, in deciding whether a patent shall issue or not, the commission acts on evidence, finds the facts, applies the law, and decides questions affecting not only public but private interests; and so as to reissue or extension, or on interference between contesting claimants; and in all this he exercises judicial functions."
>
> * * * * * * * * *
>
> "We agree that it is of vital importance that the line of demarkation between the three great departments of government should be observed, and that each should be limited to the exercise of its appropriate powers; but in the matter of this appeal we find no such encroachment of one department on the domain of another as to justify us in holding the act in question unconstitutional."

The test thus applied is whether or not they are matters involving public rights presented in such form that the judicial power is capable of acting upon them and which is susceptible of judicial interpretation. Here we have the Tariff Commission of the United States as agents of the President on the one side, and the importers or consignees on the other. The matter litigated is whether or not the importers have unlawfully imported into the United States by unfair methods of competition or unfair acts certain articles of commerce. The matter involved is a matter of public right which can be validly adjudicated by the courts. As between the Tariff Commission and the importer the findings of the Commission are by statute expressly held to be conclusive, unless an appeal is taken. Upon such an appeal the statute provides that the judgment of the United States Court of Customs Appeals is final except as the same may be reviewed by this Court in the manner provided by statute. It is true that the United States Court of Customs Appeals is only expressly empowered to ascertain whether the evidence is sufficient to support the findings, and if insufficient, to demand that additional evidence be taken. It is also true that the court is not expressly empowered to affirm, reverse or modify the findings of the Tariff Commission if the taking of new evidence is not appropriated, but the statute further provides that the appeal shall be taken in the manner as appeals may be taken from decisions from the United States Board of General Appraisers.

Judicial Code, Sections 195, 196, 198, as amended, 28 U. S. C. A., Sections 308, 309, 310, confers exclusive appellate jurisdiction to review by appeal the latter decisions without expressly using language to indicate that it may reverse, modify or remand. While Congress did not expressly so provide, *it is clear however that such power is implied by the use of the language granting the appeal* *itself.* We thus have a judgment between the parties affecting a proper subject matter.

It is argued that assuming that the Court would enter a judgment holding that unfair methods of competition exist or *vice versa*, there is no power in the statute to enforce such a judgment. While Congress did not provide a remedy in such a case it does not follow that such a remedy does not exist.

Let us suppose that Section 316 had stopped short and simply made it unlawful for importers to import articles by unfair methods of competition and unfair acts. It would follow that any Federal Court of competent jurisdiction could, by injunction, if the act were continuing in character, as alleged in the case at bar, restrain such unlawful conduct (*Bruhl* v. *Wilson*, 123 Fed. 957). It follows then that the mere fact that Congress has failed to provide an express remedy by the statute, creating the right does not mean that an implied remedy, such as will grant the relief or prevent the wrong, does not obtain.

Let us then suppose that the judgment of the Court holds, in the case at bar that no unfair methods of competition exist. Let us assume further that the Tariff Commission dissatisfied with the judgment of the Court reports to the president that in its opinion, nevertheless such unfair methods of competition do exist and recommends either the imposition of an additional tax or an embargo. Assuming that the president were nevertheless to act upon the advice of the Tariff Commission and direct the Secretary of the Treasury as the statute provides, to levy a tax or impose an embargo. Does it not follow then that the party aggrieved could by application to the Supreme Court of the District of Columbia secure an injunction restraining the Secretary of the Treasury from enforcing the presidential proclamation as a mere nullity and in excess of jurisdiction?

In *Marbury* v. *Madison*, 1 Cranch. 137, this Court held that the judiciary was not powerless to carry into effect its process against the executive branch of the Government when it proceeds in excess of jurisdiction. This proposition is so self-evident as not to require further elucidation.

But it may be said that assuming that the judgment of the United States Court of Customs Appeals is that unfair competition does exist and suppose the Tariff Commission makes a report in due course to the President and advises him of the judgment of that Court. Let us suppose further that the President declines arbitrarily to enforce such a judgment. What remedy is there then against the executive branch of the Government?

It may be that no Court could, by mandamus or injunction, act directly against the President. This question is an open one, and has never been directly before the Court for adjudication (see 38 *Corp. Jur.*, p. 684, Sec. 242). Where mandamus has been sought against the Chief Executive of a State, some Courts have held, that if the act sought to be performed is purely ministerial mandamus will lie (see 38 *Corp. Jur.* 662, Sec. 207), the reason for this view being:

> "To hold that the governor may set aside the laws at will in contrevention of the constitutional provision that he shall faithfully execute them would be a 'misconception, sarcasm, and travesty upon the organic act, upon which the state stands' " (*State* v. *Dickerson*, 33 Nev. 540, 570, 113 Pac. 105).

On the other hand, of course, mandamus will not issue where the duty or act to be performed is discretionary. In this case the President would have no discretion after the Court had entered its judgment.

It would therefore seem to follow that the President could be coerced in such a case by a court of competent jurisdiction.

On the other hand, assuming that coercion by mandamus or injunction directly against the President is unthinkable, as some authorities would seem to hold, nevertheless, the mere fact that the Court is unable directly to prevent executive usurpation of power in such a case would not render the judgment of the Court ineffective. A disregard of the judgment of a court of competent jurisdiction by the executive authority would certainly be strong ground for congressional action. Fortunately these troublesome questions are not before the Court in this matter, and are only discussed in order that it may be seen at once that the judgment is not purely advisory, but is binding upon the parties to the case.

The cases cited by the petitioner,

> *Postum Cereal Company, Inc.* v. *California Fig Nut Company*, 272 U. S. 693;
>
> *Liberty Warehouse Co.* v. *Grannis*, 273 U. S. 428;
>
> *Muskrat* v. *United States*, 219 U. S. 346,

are all without application and to the facts here stated.

The *Postum* case, *supra*, arose in the following manner: Postum Cereal Company, Inc., procured the registration of a trade mark under the name of "Grape Nuts". The California Fig Nut Company secured registration of a trade mark under the name of "Fig Nuts". Under the statute any person deeming himself injured by the registration of a trade mark has a right to apply to the Commissioner of Patents to cancel it. Upon due notice to the registrant, a hearing is given before an Examiner of Interferences in the Patent Office, with right of appeal to the Commissioner of Patents. It is to be noted that no appeal was given from the decision of the Commissioner of Patents to the courts, as it was expressly given in a patent dispute under Section 9 of the Act of February 20, 1905. The Commissioner decided against the Postum Company, and held that it was not injured by the registration of the trade mark "Fig Nuts". An appeal was taken to the Court of Appeals of the District of Columbia. That Court held that in absence of express legislation giving such right of appeal, no such right existed.

Thereupon, the case was taken to this Court. This Court pointed out that by the trade mark legislation the decision of the Commissioner of Patents as to whether or not the registration of a trade mark should or should not be cancelled was binding on no one, and that the decision of the Commissioner holding that the trade mark interferes with that of another was not *res adjudicata* against action between the two contesting parties in a court of law.

The Court showed that under these circumstances the judgment of the Circuit Court of Appeals or of this Court would be advisory only, and would not be conclusive on any of the parties.

Said this Court: "It is merely an instruction to the Commissioner of Patents by a court which is made part of the machinery of the Patent Office for administrative purposes. In the exercise of such function it does not enter a judgment binding parties in a case as the term case is used in the third article of the Constitution."

It is thus clear that the reason for the refusal of the Court to entertain the case was not based upon the fact that the appeal involved a review of an administrative decision, but was because that administrative decision was binding upon no one and was not final or conclusive upon the parties.

In the case at bar, on the other hand, by the express provision of the statute, the findings and conclusions in judgment of the Court of Customs Appeals is binding and conclusive upon all concerned. The matter, as we have noted, involves one of public right which is presented in such form that judicial power is capable of acting thereon.

In the *Muskrat* case, Congress, by the act passed March 1, 1907 (part of the Indian Appropriation Bill), 34 Stat. at L. 1015, 1028, Chap. 2285, endeavored to confer authority upon the Court of Claims to determine the constitutional validity of certain statutes affecting Indian lands. It appeared that Congress, in 1902, by act of September 1st of that year, undertook to allot certain lands amongst members of the Indian tribes, and subsequently, by Act of April 26, 1906, changed the allotment by increasing the number of persons entitled to participate in the division of such lands by permitting the enrollment of children who were minors on March 4, 1906, whose parents had then been enrolled as members of the Cherokee tribe, or had applications pending for that purpose.

The Congress apparently was uncertain as to the validity of this last mentioned legislation and by the act of March 1, 1907, undertook to confer jurisdiction upon the Court of Appeals with right of appeal by either party to the Supreme Court of the United States to hear, determine and adjudicate such suits.

The statute further provided in effect that if the final judgment denied the validity of the acts and rendered judgment in favor of persons authorized to commence such suits, the attorneys' fees fixed by the court, were to be paid out of the Treasury of the United States belonging to the beneficiaries under act of July 1, 1902.

In pursuance of this legislation, the actions were commenced, this court, however, declared the act unconstitutional since in fact it was an action for declaratory judgment which bound no one as it could not have been *res adjudicata* upon the actual allottees and was practically an advisory opinion.

It is to be noted that the matter arose in the forms as would any other cause arise between a complainant and a defendant. The form in which the cause arose was not considered as important as was the question as to whether the Court had the right to express advisory opinions upon which the judicial power of the Government was incapable of enforcing.

Here, again, we find sharp distinction to be drawn between that cause and the one at bar. While this cause did not arise between a plaintiff or complainant and a defendant, there are parties to the dispute and the matter involved is the question as to whether or not the importers have violated the provisions of the Tariff Act by importing articles by unfair methods of competition or unfair acts and the adjudication by the Court that such acts were or were not committed would constitute a valid adjudication as between the parties to the litigation for all time on that question, and would be binding as we have shown by the executive department of the Government as well as the importers and consignees.

We have already shown that the power is not lacking in the courts for the enforcement of such a finding. This case would, therefore, fall within the definition of judicial power as found by Mr. Justice Miller, quoted with approval by Mr. Justice Day in the *Muskrat case*, *supra*.

The case of *Liberty Warehouse Co.* v. *Grannis, supra*, relied upon by the petitioner, arose on the law side of the Federal District Court for Eastern Kentucky, and presumably the jurisdiction of that Court was invoked because of the diversity of citizenship of the parties. The Legislature of Kentucky, by acts of 1922, ch. 23, passed the Declaratory Judgment Law, and in accordance with said act and the Federal statute of conformity, relief against Chapter 10 of the Kentucky Acts of 1924 regulating the sale of leaf tobacco at public auction was sought by asking the Court to declare that the act of the Legislature was unconstitutional and void and in violation of the commerce clause and equal protection clause of the Constitution, as well as clauses contained in the Fourteenth Amendment.

Here, again, this Court reiterated its position that the Federal Courts have no jurisdiction to entertain suits for declaratory judgments in the absence of proper parties to the litigation and a subject matter which would result in a binding and enforceable judgment having the effect of *res adjudicata* in subsequent litigation.

This, of course, in no sense involves a mere declaratory judgment, but is in a true sense a litigation which is binding and enforceable as we have already noted.

Summary.

It must be concluded, if the *entire statute is not violative of the organic law*:

1. That a case or controversy may arise between parties litigant before an administrative body. The mere fact that a justiciable controversy is in the first instance relegated to administrative officers is in itself no reason

why the courts may not review the decisions or finding of such officials.

2. That the statute contemplates the existence of a controversy between the Tariff Commission or importers or consignees, etc.

3. That the matter to be adjudicated is the question as to whether or not the importers have imported articles in the United States by unfair methods of competition or unfair acts, the tendency of which is to destroy efficiently and economically operated industries of the United States.

4. That such findings are reviewable by an inferior court established under the Constitution for the reason that the same involves a case or controversy upon which the judicial power is capable of acting because:

A. The findings or judgment is conclusive and binding upon the importers and consignees as well as the Tariff Commission and executive department of the Government.

B. That the judgment may be enforced when adverse to the importer by the imposition of an increased rate of duty or embargo as the case may require, and if in favor of the importer or consignee may be enforced against the Government by proper proceedings in the nature of mandamus or injunction as the case may require.

POINT II.

If the statute is in part unconstitutional the whole must be struck down.

If this Court were to hold, notwithstanding the arguments above set forth, that the matter does not involve a case or controversy within the meaning of the constitution, therefore, no right of appeal is accorded the importer or consignee, we respectfully suggest that this Court should not leave the importer in that position without in some way indicating that the whole statute is void and that no rights thereunder can validly be obtained by the Bakelite Corporation.

The Congressional Debate in the Appendix indicate clearly that this action never would have received the sanction of Congress had there not been scrupulous attempt to protect the rights of the importer or consignee. It is the well-settled principle of constitutional law requiring no citation of authority in this Court that where a statute is unconstitutional in part and that *part is further interwoven and interconnected with such part thereof*, as might have nevertheless been valid and it clearly appears that Congress would never have enacted the one without including the other, the whole statute must be condemned. Such a case would thus be presented here.

Moreover, we have shown that if unrestrained discretion is vested in the executive to issue embargo and fix rates of duty and that the judgment of the courts which Congress had chosen as the vehicle to restrain that discretion, is not binding upon the executive, then the whole statute falls within the principle that Congress cannot delegate such functions to the executive as it would then be purely law-making and could constitute an abdication of the constitutional duty of Congress.

For both of these reasons the whole statute would be violative of the constitution.

If this Court were merely to strike down in this proceeding the clause granting right of appeal and say nothing more with respect to the validity of the remaining legislation, endless, protracted and expensive litigation would ensue. Undoubtedly, the findings of the Tariff Commission would be made final by the President, and the question as to whether the embargo or increased rate of duty is valid would have to be litigated through the United States Customs Court, and back to the United States Court of Customs Appeals and then to this Court. Or in the alternative the importers might be driven to an action for injunctive relief which would ultimately find its way here after a lapse of many years and incalculable harm and injury to the business of the importer and endless expense.

For these reasons, if no other, we respectfully suggest that this Court should in the event that it is convinced that the statute is unconstitutional, pronounce the whole thereof inoperative and void.

POINT III.

The rule should be discharged and petition dismissed.

Respectfully submitted,
Meyer Kraushaar,
Counsel for Importers.

APPENDIX.

Extract from Congressional Record, August 11, 1922, pages 11241 to 11244, Sixty-second Congress, Part 11, Second Session.

Mr. McCumber. Mr. President, I present on behalf of the committee certain amendments to the amendments which have been proposed by the committee, which I ask may be read. I think it will not be necessary to read them all except as they are offered, and I will now offer the first one on the list.

The Presiding Officer. The Secretary will state the amendment to the amendment.

The Reading Clerk. On page 277, line 5, after the word "section," it is proposed to strike out "jurisdiction is hereby conferred upon the executive department or independent establishment of the Government, or both acting in co-operation, which he shall designate," and to insert in lieu thereof the words "the United States Tariff Commission is hereby authorized."

Mr. McCumber. Mr. President, I will state generally that subdivision (a) of section 316 provides that unfair methods of competition and unfair acts in the importation of merchandise the tendency of which is to destroy or substantially injure any industry efficiently and economically operated in the United States or to prevent the establishment of such an industry or to restrain or monopolize trade and commerce in the United States is declared to be unlawful. Subdivision 2 of section 316 authorizes the imposition of penalty duties or the prohibition of the importation of particular merchandise for the purpose of preventing unfair methods of competition in such importation. Subdivision (b) as originally reported to the Senate authorized the President to select the agency to investigate any alleged violation of the section. The amendment now offered specifies that the Tariff Commission shall make the investigation.

That, Mr. President, substantially states the purpose of the several minor amendments which I have sent to the desk.

Mr. Walsh of Montana. Mr. President, I express the hope that this section may be disposed of quite speedily. I desire, however, to call attention to one or two features of it, and particularly to explain what the section is about.

Some time ago I summarized the provision as follows:

> The President is authorized to inquire into unfair methods of competition and unfair acts on the part of any owner, importer, consignee, or agent of either, in respect to either the importation of any merchandise or the sale of such as is imported, "the effect or tendency of which is to destroy or substantially injure an industry or to restrain or monopolize trade and commerce in the United States," utilizing for such inquiry any existing agency of Government—

Now, the Tariff Commission is the agency to be used—

> and finding such method to exist, or acts to have been committed, to impose such an additional duty, not to exceed 50 per cent of that fixed by the bill, as will "offset such method or acts," or, "in extreme cases," he may direct that "as he shall deem the best interests of the United States shall require," such merchandise "shall be excluded from entry," such direction to have the force of law.

I need not say that upon principles of the law frankly conceded upon the other side of the Chamber this section cannot possibly be sustained as a constitutional exercise of the power of Congress; but I do not care to debate that matter now. What I want to call your attention to is this: If the Tariff Commission shall find that these unfair practices are being pursued, relief is given to the person whose interests are affected through judicial review. He may go before the Court of Customs Appeals and protest against the decision of the President in the matter, and, if his action is not justified, it may be annulled. He may even go to the Supreme Court of the United States by appeal from the decision of the President in that matter, indicating what I insisted time and again upon this floor, that whenever this delegation of power is given there must be given an opportunity for review in the courts. The principle is acknowledged in this part of the bill; but I pass that.

> Whenever the existence of any such unfair method or act shall be established to the satisfaction of the President, he shall determine the rate of additional duty, not exceeding 50 nor less than 10 per cent of the value of such merchandise as defined in section 402—

And then he imposes those duties.

Mr. President, I daresay that the President of the United States is as accomplished a mathematician as the ordinary Member of this body; but how he is going to convert into a rate of duty the offense committed by importers or dealers in imported articles so as to offset by his rate of duty the evil that is thus perpetrated is a problem which I shall not undertake to solve. I merely call attention to the matter in passing.

He may not only impose this speculative duty which is thus arrived at, however, but in extreme cases he may declare that that merchandise shall be excluded from the United States entirely. Just exactly what is an extreme case, or a moderate case, or a mild case, we are left merely to speculate. Of course, this gives to the President the power to impose any duty he sees fit, or to exclude the merchandise altogether if he sees fit. In other words, the discretion vested in the President by section 315 is made perfectly obvious and indisputable under the provisions of section 316.

But that is not the worst of this, Mr. President. You will observe that it provides at the outset:

> That unfair methods of competition and unfair acts in the importation of merchandise into the United States, or in its sale by the owner, importer, consignee, or agent of either, the effect or pendency of which is to destroy or substantially injure an industry, efficiently and economically operated—

Are declared to be unlawful, and to be punished or prevented in the manner that is indicated. Of course, that means something in the nature of a continuing custom or practice or regular habit of the people who are engaged in the importation of that particular commodity. Then the President may impose a duty upon further importations. But wait:

We have half a dozen foreign importers engaged in these wrongful acts, and we have half a dozen other importers in this country, highly honorable, reputable business men, who are denouncing these acts, and insist that they ought not to be continued. A duty of anywhere from 10 to 50 per cent is thereupon imposed upon the importation of that kind of commodity, to be paid by the honest, law-abiding importers and merchants engaged in the selling of imported merchandise just exactly the same as by the wrongdoer who gave rise to the action of the President, or, in extreme cases, the man's business is to be utterly ruined when he has been endeavoring to do the best he can to carry on his business in a legitimate and an honorable way.

Mr. Pomerene. Mr. President—

The Presiding Officer. Does the Senator from Montana yield to the Senator from Ohio?

Mr. Walsh of Montana. I do.

Mr. Pomerene. It can be assumed that these tariff duties, like the rain, fall on the just and the unjust alike.

Mr. Walsh of Montana. I have said all I care to say about this section, Mr. President.

Mr. McCumber. Mr. President, I assume, from the standpoint of the Senator from Montana, that the fiction of the Democratic Party still holds good that a Democratic administration can do no wrong, and that any law that is passed by such administration is a very proper law.

In comparison with the powers that are given to the President under section 316, I want to read the power that was given to the President under the law of 1916. Taking section 804 as the standard, it provides:

> That whenever any country, dependency, or colony shall prohibit the importation of any article the product of the soil or industry of the United States and not injurious to health or morals, the President shall have power to prohibit, during the period such prohibition is in force, the importation into the United States of similar articles, or in case the United States does not import similar articles from that country, then other articles the products of such country, dependency, or colony.

He is not limited in the selection of those articles. He is not limited in the number of those articles. If you were to give this the broadest construction, if there were three American articles prohibited from entering that foreign country, the President would have a right under this to prohibit anything coming from that foreign country to the United States. Absolutely unlimited was the power given to President Wilson.

Now let us take the next section, section 805:

> That whenever * * * the President shall be satisfied that there is reasonable ground to believe that under the laws, regulations, or practices of any country, colony, or dependency contrary to the law and practice of nations—

He is to determine that—

> the importation into their own or any other country, dependency, or colony of any article the product of the soil or industry of the United States and not injurious to health or morals is prevented

> or restricted the President is authorized and empowered to prohibit or restrict during the period such prohibition or restriction is in force, the importation into the United States of similar or other articles, products of such country, dependency, or colony as in his opinion the public interest may require—

Think of that broad power—"as in his opinion the public interest may require"—

> and in such case he shall make proclamation stating the article or articles which are prohibited from importation into the United States; and any person or persons who shall import, or attempt or conspire to import, or be concerned in importing, such article or articles, into the United States contrary to the prohibition in such proclamation, shall be liable to a fine of not less than $2,000 nor more than $50,000, or to imprisonment not to exceed two years, or both, in the discretion of the court. The President may change, modify, revoke, or renew such proclamation in his discretion.

Mr. President, no court has challenged that that I know of. It was not a war power, because it was a power given before we entered the war. The provision in section 316 is guarded in every respect as carefully as we have guarded the provisions of section 315 as to the hearings, as to the body which shall furnish the President the information, and so forth.

Mr. Spencer. Mr. President, I ask that the Secretary read the proposed amendment.

The Presiding Officer (Mr. Jones of Washington in the chair). The Secretary will state the amendment.

The Assistant Secretary. On page 277 of the bill it is proposed to strike out all of the matter beginning with the word "jurisdiction," in line 5, down to and including the word "designate," in line 8, or the following words:

> Jurisdiction is hereby conferred upon the executive department or independent establishment of the Government, or both, acting in co-operation, which he shall designate.

And to insert in lieu thereof the words:

> The United States Tariff Commission is hereby authorized.

Mr. Spencer. Mr. President, up to the present time the Tariff Commission has been confined entirely to research and examination. When it makes its examination into any question which the tariff may eventually affect, either side uses the result of that research for their own information. Sometimes those who are opposed to a protective tariff find much to support their position in the report of the Tariff Commission. Sometimes those of us who believe in a protective tariff find much to support our position.

I want to say that if this amendment carries it means the beginning of the end of the Tariff Commission, because for the first time we will put upon the Tariff Commission the responsibility, not of research, not of investigation, not of furnishing information only, but we will put upon them the responsibility of determining what rates ought to be placed upon any given commodity.

The result will be that when the return of the Tariff Commission on any rate is made and their report comes in from one side or the other of this Chamber there will be opposition. When you inject the Tariff Commission into the political differences over the tariff you spell the beginning of the end of the Tariff Commission. It is proposed to give to them now for the first time the right not only of examination, not only of research, but to themselves announce what they think ought to be the rate. That means that if they venture their opinion with regard to a rate which leans toward a tariff for revenue only, I am against it. It means, on the other hand, that if they announce an opinion which leans toward a protective tariff, men upon the other side are against it, and every action of the Tariff Commission will be either attacked or supported in this Chamber in accordance with the opinions of the Members on the question of the tariff itself. That will end the usefulness of the Tariff Commission.

I have only one thing else to say, and that is that it is a bad policy to allow those who make the investigation by way of research to act at the same time in a judicial capacity to determine what ought to be done, because when a body investigates merely for information they are independent, they do not let the chips fall where they will; they are seeking for light, and they gather the facts as they are and present them.

If you substitute for that condition a Tariff Commission which gathers information and then ventures its opinion, its recommendation, its finding, its fixing of rates, what is the result? The next time the Tariff Commission investigates that subject upon which they have already fixed their rates they are bound to direct their investigation so as to support their findings, and they will have lost their impartial character. They can no longer be depended upon as an impartial body of research and investigation; they will have become a political factor in the making of the tariff, and that will end their usefulness.

Mr. Frelinghuysen. Mr. President, the fundamental rule is laid down as to how these facts shall be found and comparisons made, based entirely upon competitive conditions. How can the Tariff Commission adopt any policy of a tariff for revenue only? The proposition, and it is not very persuasive to me to say that between two conditions, and it has not resulted in political influence or any particular tariff policy in any other country which imposes tariffs, and places the responsibility of making a rate on a commission where they lay down the fundamental principle upon which the rates shall be levied.

Mr. Spencer. Does not the Senator see the difference between an impartial, independent commission, which shall gather information and give the result of what they find, and another commission which itself passes upon the rate, and which, of course, must sustain its findings, so that in the latter case all its subsequent research lacks the character of independence and is directed toward the establishment of the correctness of the finding which they have already made? You will change the whole character of the Tariff Commission; you will change it from an independent body of research, of investigation, of information into a political agency, and you will spell the end of the Tariff Commission.

Mr. Frelinghuysen. Will it be any more of a political body than a committee of Congress trying to base their findings upon inaccurate information and upon no rule whatsoever?

Mr. Lenroot. Mr. President, I have no objection to the amendment which has been proposed, but I do want to say a word in connection with the subject matter to which the amendment relates. I agree with the Senator from Montana in his views concerning the validity of the section, and it is not very persuasive to me to say that because a Democratic law gave to the President power which I do not believe Congress had any constitutional authority to give him therefore a Republican proposed law is made valid.

Of course, the chairman of the committee will admit that the sections to which he has referred have never been brought into question, because the President has never exercised the power sought to be conferred by them. I have no question whatever that the Congress has the power, if the President finds that another country has discriminated against us in any way, to authorize him to proclaim an embargo upon the importation of any article exported from that country to this country; but the law which has been referred to permits the President to select articles of merchandise or commodities upon which he may create an embargo and admit others. That, it seems to me, is clearly an exercise of legislative authority, which cannot be delegated.

So, under the amendment now proposed, if one importer has indulged in unfair competition, and a finding to that effect is sustained and reported to the President, because one importer has been guilty of wrongdoing the President may fix rates from 10 to 50 per cent ad valorem upon all merchandise, either of that character or any different character.

Mr. Reed. Let me ask the Senator whether, in the case he has just put, it would not be much wiser if we provided penalties to be visited upon the particular importer who violated the proper practices, and reach it in that way, instead of reaching it by excluding everybody?

Mr. Lenroot. I think that is the way to reach it. The Senator from Utah has just called my attention to one of the amendments which is intended to be proposed, which will limit it to merchandise imported in violation of this act. Do I understand from the Senator from Utah, then, that it will not be a general rate imposed upon all merchandise but will be a rate imposed upon merchandise imported by a given individual who is guilty of violation of the act?

Mr. Smoot. That is all there is to it, Mr. President. The criticism the Senator has just offered to the original paragraph is absolutely correct. Under that, if there had been one violation the President could have imposed the extra duty upon all importations, by any and every person, of that kind of merchandise, and that is why the committee is going to offer this amendment.

Mr. Lenroot. I am very frank to say that that very greatly improves the section.

Mr. Walsh of Montana. Mr. President, I merely desire to say, before the vote is taken, that, as remarked by the Senator from Wisconsin, I do not consider it any answer to the objection made to this section to say that at some other time Congress passed another law which was equally obnoxious. Nor do I feel at all subject to the imputation of accepting as within the bounds of the Constitution every act passed by a Democratic Congress and during a Democratic administration, and finding fault with similar acts passed in a Republican administration.

I have had no opportunity to examine the statute to which the Senator from North Dakota makes reference. In some of its featuers, at least, it is easily sustained by the case of Field against Clark. I do not undertake to state, however, that it could be sustained by that decision nor that it could be sustained at all. Indeed, in the case of Field against Clark the Supreme Court referred to many statutes which had been passed which seemed to confer upon the President discretionary power. They merely so remarked, without undertaking to say that upon an inquiry into any particular one of those statutes it might not be found to be violative of the Constitution. That seems to be no answer at all to the argument.

Here follow record of vote and copy of measure.

Statute Under Consideration.

Unfair methods or acts declared unlawful.

Sec. 316. (a) That unfair methods of competition and unfair acts in the importation of articles into the United States, or in their sale by the owner, importer, consignee, or agent of either, the effect or tendency of which is to destroy or substantially injure an industry, efficiently and economically operated, in the United States, or to prevent the establishment of such an industry, or to restrain or monopolize trade and commerce in the United States, are hereby declared unlawful, and when found by the President to exist shall be dealt with, in addition to any other provisions of law, as hereinafter provided.

Tariff Commission to investigate.

(b) That to assist the President in making any decisions under this section the United States Tariff Commission is hereby authorized to investigate any alleged violation hereof on complaint under oath or upon its initiative.

Hearings to be afforded; Findings of facts to be conclusive; Questions of law subject to review.

(c) That the Commission shall make such investigation under and in accordance with such rules as it may promulgate and give such notice and afford such hearing, and when deemed proper by the Commission such rehearing with opportunity to offer evidence, oral or written, as it may deem sufficient for a full presentation of the facts involved in such investigation; that the testimony in every such investigation shall be reduced to writing, and a transcript thereof with the findings and recommendation of the commission shall be the official record of the proceedings and findings in the case, and in any case where the findings in such investigation show a violation of this section, a copy of the findings shall be promptly mailed or delivered to the importer or consignee of such articles; that such findings, if supported by evidence, shall be conclusive, except that a rehearing may be granted by the Commission, and except that, within such time after said findings are made and in such manner as appeals may be taken from decisions of the United States Board of General Appraisers, an appeal may be taken from said findings upon a question or questions of law only to the United States Court of Customs Appeals by the importer or consignee of such articles; that if it shall be shown to the satisfaction of said court that further evidence should be taken, and that there were reasonable grounds for the failure to adduce such evidence in the proceedings before the Commission, said court may order such additional evidence to be taken before the Commission in such manner and upon such terms and conditions as to the court may seem proper; that the commission may modify its findings as to the facts or make new findings by reason of additional evidence, which, if supported by the evidence, shall be conclusive as to the facts except that within such time and in such manner an appeal may be taken as aforesaid upon a question or questions of law only; that the judgment of said court shall be final, except that the same shall be subject to review by the United States Supreme Court upon certiorari applied for within three months after such judgment of the United States Court of Custom Appeals.

Findings to go to President.

(d) That the final findings of the commission shall be transmitted with the record to the President.

Additional duties to offset unfairness; Exclusion of articles from entry.

(e) That whenever the existence of any such unfair method or act shall be established to the satisfaction of the President he shall determine the rate of additional duty, not exceeding 50 nor less than 10 per centum of the value of such articles as defined in section 402 of Title IV of this Act, which will offset such method or act, and which is hereby imposed upon articles imported in violation of this Act, in what he shall be satisfied and find are extreme cases of unfair methods or acts as aforesaid, he shall direct that such articles as he shall deem the interests of the United States shall require, imported by any person violating the provisions of this Act, shall be excluded from entry into the United States, and upon information of such action by the President, the Secretary of the Treasury shall, through the proper officers, assess such additional duties or refuse such entry; and that the decision of the President shal be conclusive.

Entry under bond.

(f) That whenever the President has reason to believe that any article is offered or sought to be offered for entry into the United States in violation of this section but has not information sufficient to satisfy him thereof, the Secretary of the Treasury shall, upon his request in writing, forbid entry thereof until such investigation as the President may deem necessary shall be completed: *Provided,* That the Secretary of the Treasury may permit entry under bond upon such conditions and penalties as he may deem adequate.

In the Supreme Court of the United States

OCTOBER TERM, 1928

NO. —, ORIGINAL

Ex Parte: IN THE MATTER OF THE BAKELITE Corporation, petitioner

RETURN OF THE PRESIDING JUDGE AND ASSOCIATE JUDGES OF THE UNITED STATES COURT OF CUSTOMS APPEALS

To the Honorable The CHIEF JUSTICE AND THE ASSOCIATE JUSTICES OF THE SUPREME COURT OF THE UNITED STATES:

William J. Graham, Presiding Judge, and Oscar E. Bland and Charles S. Hatfield, Associate Judges of the United States Court of Customs Appeals, do hereby make return to the rule to show cause issued herein on the eighth day of October, 1928, why a writ of prohibition should not issue to restrain them from entertaining the appeal from the findings and recommendations of the United States Tariff Commission in a cause entitled "In the Matter of The Investigation of alleged unfair methods of competition and unfair acts in the importation and sale of Synthetic Phenolic Resin, Form C, and

articles made wholly or in part thereof. Frischer & Co., Inc., Randes Importing Company, Transatlantic Clock & Watch Co., Inc., Western Briar Pipe Company, National Council of Importers & Traders, Inc., Appellants, Bakelite Corporation, Abse Brothers, Embed Art Corporation, Kaufmann Bros. & Bondy, Reiss-Premier Pipe Company, S. M. Frank & Co., Inc., Wm. Demuth & Company, L. & H. Stern, Inc., Appellees," and why they should not cancel and annul the judgment order entered by them in said cause May 25, 1928, denying a motion to dismiss an appeal therein, and they respectfully answer and certify as follows:

1. The United States Court of Customs Appeals obtained its supposed jurisdiction of the litigation involved herein in the following manner:

On the 16th day of December, 1925, the Bakelite Corporation, a Delaware corporation, having its principal place of business in the city of New York, Abse Brothers, a partnership, having its principal place of business in Brooklyn, New York, and the Embed Art Corporation, a New Jersey Corporation, having its principal place of business at Perth Amboy, New Jersey, filed with the United States Tariff Commission a complaint under oath asking relief under Section 316 of Title III of the Tariff Act of 1922 from unfair competition in the importation and sale of beads of all kinds and materials or articles made of Synthetic Phenolic Resin or "Bakelite." The basis of this complaint was that articles made from Synthetic Phenolic Resin were being imported into the United States in violation of the patent rights of the Bakelite Corporation, which was alleged to constitute unfair methods of competition under said Section 316. A hearing was had before the United States Tariff Commission on this complaint, at which time the complainant and certain interested importers were fully heard. Following this, on the 16th day of April, 1926, the United States Tariff Commission issued an order recommending that the President request the Secretary of the Treasury to forbid entry of such Synthetic Phenolic Resin pending an investigation by such Commission, in pursuance to the provisions of said Section 316. An order to that effect was duly issued on April 26, 1926, by the Assistant Secretary of the Treasury. Afterward, on May 25, 1927, a final order was entered in said proceeding by the said Tariff Commission excluding the importations in question from entry into the United States. Thereupon, on July 8, 1927, Frischer & Co. (Inc.), Randes Importing Company, Transatlantic Clock & Watch Co. (Inc.), and Western Briar Pipe Company, claiming to be persons interested, filed a petition for review in the United States Court of Customs Appeals, under and by virtue of the provisions of said Section 316, subsection (c). A transcript of the record in said cause was filed in the October Term, 1927, of said court, and thereafter the matter came on to be heard upon the motion of the Bakelite Corporation to dismiss the said appeal, it being alleged therein that the said United States Court of Customs Appeals had no jurisdiction of the subject matter. Upon consideration of said motion the said court held that it did have such jurisdiction, refused to dismiss the appeal, set the cause for hearing on its merits, and filed an opinion setting forth its reasons for such action, a true copy of which opinion, marked "Exhibit A," is attached to and is made a part of the petition for a writ of prohibition filed in this Court. This is the present status of the cause in the United States Court of Customs Appeals. No hearing upon the merits has been had and no final judgment entered.

2. The United States Court of Customs Appeals has taken jurisdiction of the appeal, believing (*a*) that the United States Court of Customs Appeals is a court of the United States created and existing under Article III of the Constitution of the United States, (*b*) that the litigation in question constitutes a case or controversy within the meaning of Article III of the Constitution of the United States.

The ideas of the Judges of the United States Court of Customs Appeals on this subject are fully developed and set forth in its opinion, copy of which is made a part of the petition for writ of prohibition herein.

The Bakelite Corporation, which now seeks a writ of prohibition, invoked the jurisdiction of the United States Tariff Commission under Section 316 of Title III of the Tariff Act of 1922, and having obtained relief in said proceeding now seeks to prevent the United States Court of Customs Appeals from reviewing the order granting such relief, in accordance with the provisions of Section 316 of Title III of the Tariff Act of 1922.

And these are the reasons which respondents offer why a writ of prohibition should not issue as prayed for.

Your respondents respectfully submit to the judgment of this Honorable Court.

William J. Graham,
Presiding Judge.

Oscar E. Bland,

Charles S. Hatfield,
Associate Judges.

Washington, D. C., *October 29, 1928.*

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In the Supreme Court of the United States

OCTOBER TERM, 1928

No. 17, ORIGINAL

EX PARTE IN THE MATTER OF THE BAKELITE CORPORATION, PETITIONER

BRIEF ON BEHALF OF THE UNITED STATES COURT OF CUSTOMS APPEALS

OPINIONS BELOW

The opinion of the Court of Customs Appeals sustaining its jurisdiction on the appeal from the Tariff Commission is reported in 53 Treasury Decisions 716, and is printed in the petitioner's brief at page 30.

JURISDICTION

The action of this Court in entertaining jurisdiction of the petition for writ of prohibition to prevent the Court of Customs Appeals from exercising jurisdiction of an appeal from the findings of the Tariff Commission is apparently based upon

Section 262 of the Judicial Code (U. S. C. Title 28, Sec. 377), which provides that:

> The Supreme Court, the Circuit Courts of Appeals, and the District Courts shall have power to issue all writs not specifically provided for by statute, which may be necessary for the exercise of their respective jurisdictions, and agreeable to the usages and principles of law.

The original jurisdiction of this Court is restricted by the Constitution to cases affecting certain classes of parties and this case is not one of these. (*In re Massachusetts*, 197 U. S. 482, 487.)

The jurisdiction, if it exists, must rest on the clause in Section 2, Article III, giving appellate jurisdiction, subject to Congressional regulation.

While this proceeding is original in form, it is appellate in substance.

Marbury v. *Madison*, 1 Cranch, 137, 175.

Although without original jurisdiction, this Court may issue a writ of prohibition if it has appellate jurisdiction to review the decision of the court below.

In re Massachusetts, supra.

Jurisdiction to review by certiorari decisions of the United States Court of Customs Appeals in cases appealed from the Tariff Commission is granted (or attempted to be granted) by Section 316 of the Tariff Act of 1922, the validity of which is here in question. This case is peculiar, in that, if the Court of Customs Appeals is held to be without jurisdiction, it may be because the section giving this Court appellate jurisdiction is void, but this Court can not hold it is without jurisdiction without first deciding that the clause in Section 316 for review by this Court on certiorari is void, and that requires a decision as to whether the appeal to the Court of Customs Appeals is a judicial case. This Court has jurisdiction to decide that much, and that is really the whole case, if all of Section 316 stands or falls together. Whether, if it be held that Section 316 is void, this Court should for that reason dismiss this petition for want of jurisdiction to entertain it, or issue the writ to the Court of Customs Appeals, is a point deserving consideration.

QUESTION PRESENTED

The principal question in this case is whether an appeal by an importer to the Court of Customs Appeals under Section 316 of the Tariff Act of 1922, to review the findings of the Commission that imported articles come into unfair competition with domestic industries, presents a judicial case or controversy under Section 2 of Article III of the Constitution. In this connection the feature of this case requiring particular scrutiny is that judicial review of the findings of the Tariff Commission occurs before final administrative action by the President, who is at liberty to refrain from further action because of disagreement with the findings of the Commission, and the question thus arises whether at an intermediate stage of administrative action a judicial review of the administrative proceedings presents a case or controversy if following the judicial action the findings reviewed and approved by the court may be disapproved by administrative action and further proceedings discontinued.

This Court may also have occasion to consider whether the Court of Customs Appeals is an inferior court of the United States organized pursuant to Article III of the Constitution.

STATUTES

Section 316 of the Tariff Act of 1922 (Act of September 21, 1922, c. 356, 42 Stat. 858, 943; U. S. C. Title 19, Secs. 174–179) provides:

> SEC. 316. (a) That unfair methods of competition and unfair acts in the importation of articles into the United States, or in their sale by the owner, importer, consignee, or agent of either, the effect or tendency of which is to destroy or substantially injure an industry, efficiently and economically operated, in the United States, or to prevent the establishment of such an industry, or to restrain or monopolize trade and commerce in the United States, are hereby declared unlawful, and when found by the President to exist shall be dealt with, in addition to any other provisions of law, as hereinafter provided.

(b) That to assist the President in making any decisions under this section the United States Tariff Commission is hereby authorized to investigate any alleged violation hereof on complaint under oath or upon its initiative.

(c) That the commission shall make such investigation under and in accordance with such rules as it may promulgate and give such notice and afford such hearing, and when deemed proper by the commission such rehearing with opportunity to offer evidence, oral or written, as it may deem sufficient for a full presentation of the facts involved in such investigation; that the testimony in every such investigation shall be reduced to writing, and a transcript thereof with the findings and recommendation of the commission shall be the official record of the proceedings and findings in the case, and in any case where the findings in such investigation show a violation of this section, a copy of the findings shall be promptly mailed or delivered to the importer or consignee of such articles; that such findings, if supported by evidence, shall be conclusive, except that a rehearing may be granted by the commission, and except that, within such time after said findings are made and in such manner as appeals may be taken from decisions of the United States Board of General Appraisers, an appeal may be taken from said findings upon a question or questions of law only to the United States Court of Customs Appeals by the importer or consignee of such articles; that if it shall be shown to the satisfaction of said court that further evidence should be taken, and that there were reasonable grounds for the failure to adduce such evidence in the proceedings before the commission, said court may order such additional evidence to be taken before the commission in such manner and upon such terms and conditions as to the court may seem proper; that the commission may modify its findings as to the facts or make new findings by reason of additional evidence, which, if supported by the evidence, shall be conclusive as to the facts except that within such time and in such manner an appeal may be taken as aforesaid upon a question or questions of law only; that the judgment of said court shall be final, except that the same shall be subject to review by the United States Supreme Court upon certiorari applied for within three months after such judgment of the United States Court of Customs Appeals.

(d) That the final findings of the commission shall be transmitted with the record to the President.

(e) That whenever the existence of any such unfair method or act shall be established to the satisfaction of the President he shall determine the rate of additional duty, not exceeding 50 nor less than 10 per centum of the value of such articles as defined in section 402 of Title IV of this Act, which will offset such method or act, and which is hereby imposed upon articles imported in violation of this Act, or, in what he shall be

> satisfied and find are extreme cases of unfair methods or acts as aforesaid, he shall direct that such articles as he shall deem the interests of the United States shall require, imported by any person violating the provisions of this Act, shall be excluded from entry into the United States, and upon information of such action by the President, the Secretary of the Treasury shall, through the proper officers, assess such additional duties or refuse such entry; and that the decision of the President shall be conclusive.
>
> (f) That whenever the President has reason to believe that any article is offered or sought to be offered for entry into the United States in violation of this section but has not information sufficient to satisfy him thereof, the Secretary of the Treasury shall, upon his request in writing, forbid entry thereof until such investigation as the President may deem necessary shall be completed: *Provided,* That the Secretary of the Treasury may permit entry under bond upon such conditions and penalties as he may deem adequate.
>
> * * * * *

Sections 315 and 317 are printed in Appendices A and B to this brief.

Article III of the Constitution provides:

> Section 1. The judicial power of the United States, shall be vested in one Supreme Court, and in such inferior courts as the Congress may from time to time ordain and establish. * * *

> Section 2. The judicial power shall extend to all cases, in law and equity, arising under this Constitution, the laws of the United States, and treaties made, or which shall be made, under their authority * * *.

STATEMENT

This case is before this Court on the return of the judges of the United States Court of Customs Appeals to an order to show cause issued by this Court on petition of the Bakelite Corporation why a writ of prohibition should not issue forbidding the Court of Customs Appeals to entertain an appeal from findings of the Tariff Commission under Section 316 of the Tariff Act of 1922. The petition and return show that on December 16, 1925, the Bakelite Corporation and two of its customers filed with the United States Tariff Commission a complaint under oath asking relief under Section 316 of Title III of the Tariff Act of 1922, from unfair competition in the importation and sale of articles made of synthetic phenolic resin or "bakelite." The basis of the complaint was that such articles were being imported into the United States in violation of the patent rights of the Bakelite Corporation, and this was alleged to constitute unfair methods of competition. A hearing was had before the Commission on this complaint. On May 25, 1927, the Commission made its findings of fact and conclusions to the effect that unfair competition resulted from the importation of such articles, that such unfair competition could not be offset by increase in the duties, and recommended that the President make an order forbidding the importation of such articles. The statement on page 3 of the return that the Commission made an order excluding the importations is inaccurate. What it did was to recommend that the President exclude them.

Thereupon, on July 8, 1927, Frischer & Co., Inc., and other companies claiming to be persons interested, filed a petition for review in the United States Court of Customs Appeals where a motion of the Bakelite Corporation to dismiss the appeal for want of jurisdiction came on to be heard. The Court of Customs Appeals held that it is an inferior court of the United States organized under Article III of the Constitution, and that the appeal presented a case or controversy within the judicial power, as defined in Article III, and denied the motion to dismiss. Thereupon the Bakelite Corporation was granted leave to file the petition in this case and the order to show cause was issued.

SUMMARY OF ARGUMENT

1. The fact that the petitioner itself invoked the jurisdiction of the Tariff Commission under Section 316 and obtained the order appealed from is not an insuperable objection to granting it relief here. It contends, not that the whole of Section 316 is void, but only that part of it allowing appeal to the Court of Customs Appeals. Besides, al-

though the petitioner did invoke the jurisdiction of the Commission, if Section 316 is invalid the petitioner is interested in not being required to respond to the appeal in the Court of Customs Appeals.

2. The question whether the appeal presented a case or controversy should be considered first, because this Court may not find it necessary to go further. In order to decide that question it is necessary to determine the meaning, operation, and effect of Section 316, and particularly whether the findings of the Commission are conclusive on the President or merely advisory. The action of the Commission and the President in raising duties or excluding importations under Section 316 is not entirely legislative or administrative as under Section 315. Its provisions are penal in their nature, imposing increased duties or exclusion of importations because of unfair competition. Because of this and the possible necessity of due process, the provision for judicial review was made. Here the judicial review comes not after administrative action is finished but midway in the administrative proceedings. Although the provisions of the section are somewhat conflicting and ambiguous, their fair meaning is that if the Commission finds there is no unfair competition, its finding is binding on the President and he may not adopt a different conclusion and raise duties or exclude articles; that if the Commission finds that there is unfair competition and recommends action by the President, he is

at liberty to reach a different conclusion and refuse to act. The result is that the findings of the Commission are controlling on the President in the sense that if he acts it must be in accordance with the Commission's findings. The case, therefore, is that the findings of the Commission form a final and indisputable basis of action by the President, *if he acts*, but he has the power to disapprove the findings and take no action, and the question is whether this prevents the appeal from the Tariff Commission's findings constituting a case or controversy.

3. It has been held that where the law provides that action of an administrative body, although reviewed and approved by a court, is merely advisory or subject to later revision by administrative officers, the application for judicial review does not present a case or controversy under the Constitution. In *Fidelity National Bank* v. *Swope*, 274 U. S. 123, this Court held that an intermediate judicial review of administrative proceedings to be followed by further administrative action constituted a case or controversy where the decision formed a final basis for further administrative action, although the administrative officials were at liberty to discontinue all proceedings. If we may accept that decision as authority for the rule that application for judicial review of administrative action does not fail to present a case or controversy merely because the administrative officers may do nothing further, the fact that the President may decline to

approve the findings of the Tariff Commission is not fatal to the contention that the appeal to the Court of Customs Appeals presented a judicial case.

4. If the Court holds that there was no case or controversy, it need not inquire whether the Court of Customs Appeals is a constitutional court, because Section 316 confers jurisdiction on this Court to review by certiorari, and that provision is void if there is no case or controversy, and we can not assume that Congress would have granted these powers to the Tariff Commission without review by this Court. The result would be that all the provisions of Section 316 must stand or fall together. If it is concluded that there was a case or controversy, there may be no occasion to inquire whether the Court of Customs Appeals is a constitutional court.

O.K.

5. The Court of Customs Appeals is a constitutional court. If the intention of Congress is a test, that intention is fully disclosed by its treatment of the subject, including its assumption that the judges have life tenure. If the jurisdiction conferred on the court is the test, it is fulfilled, because its jurisdiction has been limited to reviewing decisions of the Customs Court as to classification of imported merchandise and raising of duty under the Tariff Acts, and these are questions arising under the laws of the United States and within the judicial power defined in Article III of the Constitution. Its jurisdiction is not limited to cases

arising in Territories or the District of Columbia, but throughout the States as well. The addition to its jurisdiction of appeals from the Tariff Commission would still leave it with jurisdiction only of cases arising under the laws of the United States.

ARGUMENT

I

THE PRELIMINARY QUESTION IS WHETHER THE FINDINGS OF THE COMMISSION ARE CONCLUSIVE ON THE PRESIDENT OR MERELY ADVISORY

To determine whether appeals authorized by Section 316 present cases or controversies under the Federal judicial power, as defined in Article III of the Constitution, it is necessary, first, to determine the operation and effect of Section 316. If the Commission's findings are merely advisory and the President is at liberty to disregard them and reach his own conclusion, and if he may find that unfair competition exists where the Commission has ruled otherwise, and if he may also find that unfair competition does not exist when the Commission has held that it does, it would follow that no case or controversy is presented by the appeal from the Commission's findings, because the judgment of the court would be merely advisory and would have no binding effect on the rights of the parties or on further administrative action. The section should be construed, as far as possible, to make its provisions constitutional. The various clauses to the effect that the order raising duties or excluding merchandise may be made when the President finds that unfair competition exists, and when it has been established to his satisfaction that it exists, may not be disregarded. Although the Commission finds unfair competition to exist, no order increasing duties or excluding importations shall be made unless the President is himself convinced and agrees with the findings. The provisions to the effect that the findings of the Commission shall be conclusive, and the findings of the courts on review shall be conclusive do not mean that they are conclusive on the President. There is a statement in subdivision (e) that the decision of the President shall be conclusive. These words mean that where findings are made of unfair competition, and the President confirms them and higher duties are imposed, or importations are excluded, these findings are conclusive on importers and prevent them from questioning the new duties or the order of exclusion, either on appeal from the collector to the Customs Court or in any other tribunal.

On the other hand, the section does not necessarily mean that if the Commission finds against the charge of unfair competition the President may overrule that finding and reach the contrary conclusion and order duties raised or merchandise excluded. Nothing in the Act requires such an interpretation.

This section originated in the Senate Committee on Finance. A copy of it as reported by that Committee is set forth in Appendix C to this brief, page 48. At that stage it provided that the preliminary inquiry to assist the President should be made by such Department or Bureau as he might designate. The bill, as reported by the Committee, was amended in the Senate, and as amended and passed by the Senate and as it went to conference it is set forth in Appendix D hereto, page 52. The general purpose of the section, as stated by the report of the Senate Committee, was "to impose penalty duties or prohibit the importation of particular goods for the purpose of preventing unfair methods of competition in the importation of goods." (Senate Report No. 595, 67th Congress, 2nd Sess., p. 3.) A further explanation by Senator Smoot of its purpose was as follows (Cong. Rec. Vol. 62, Pt. 6, p. 5879):

> *Dumping and other unfair methods of competition in importation.*
>
> Dumping and other unfair methods of competition in importation have been recognized as a menace, particular under postwar conditions, to American industries. For this reason the bill permits the President to impose additional duties on goods imported into the United States by any person or corporation found guilty of dumping or other unfair methods of competition in

importation, and in extreme cases he may prohibit such importations. If any doubt whatever exists as to the effectiveness of the tariff rates and the provisions of the elastic tariff as means to protect the coal-tar dye industries, the addition of this effective unfair competition statute should remove it. We have in this measure an antidumping law with teeth in it—one which will reach all forms of unfair competition in importation. This section (316) not only prohibits dumping in the ordinary accepted meaning of that word: that is, the sale of merchandise in the United States for less than its foreign market value or cost of production; but also bribery, espionage, misrepresentation of goods, full-line forcing, and other similar practices frequently more injurious to trade than price cutting.

The antidumping statute which we enacted as a part of the emergency tariff is not sufficiently broad in its scope nor flexible enough in its administrative provisions. Furthermore, an antidumping statute, I believe, should not be confused with customs administration. It should not, on the one hand, hinder the usual and fair importation of goods; but, on the other, it should prevent effectively those importations which are injuring unfairly American business. The administration of a dumping statute involves primarily a study of the effect upon American industries of foreign trade practices, and when any person is found guilty

> of any unfair practice tending to injure substantially or destroy an American industry he should be compelled to pay a penalty or be prohibited from bringing goods into the United States until such unfair practices are conclusively discontinued. This is provided for in the Senate bill.
>
> In the economic uncertainty of the present, manufacturers in some lines of merchandise have asked for high tariff rates more because of what they fear than because of what they are experiencing. Such a law as I have suggested would assure American producers that they will not be subjected to unfair competition from countries abroad.

The Senate amended the Committee Bill by making the Tariff Commission the body to investigate and report. The provision for appeal to the Court of Customs Appeals was in the section as it came from the Committee. Senator McCumber, then chairman of the Committee, said (Cong. Rec. Vol. 62, Pt. 11, p. 11241):

> *Mr. McCumber.* Mr. President, I will state generally that subdivision (a) of section 316 provides that unfair methods of competition and unfair acts in the importation of merchandise the tendency of which is to destroy or substantially injure any industry efficiently and economically operated in the United States or to prevent the establishment of such an industry or to restrain or monopolize trade and commerce in the United States is declared to be unlawful.

> Subdivision 2 of section 316 authorizes the imposition of penalty duties or the prohibition of the importation of particular merchandise for the purpose of preventing unfair methods of competition in such importation. Subdivision (b) as originally reported to the Senate authorized the President to select the agency to investigate any alleged violation of the section. The amendment now offered specified that the Tariff Commission shall make the investigation.

Discussion arose in the Senate as to whether the section contemplated a general raise in duties on all articles of a class, action purely legislative or administrative in character, such as is provided in Section 315, to meet differences in cost of production at home and abroad, or whether the penalty of added duties or exclusion was limited to particular importers or particular articles involved in unfair competition. (See Cong. Rec. Vol. 62, Pt. 11, p. 11241, 67th Congress, 2d Session.) To make it clear that the action was in the nature of a penalty limited to offenders and offending articles, amendments were adopted to subdivision (e) to the effect that the additional duties were only "upon articles imported in violation of this Act." (Appendix E, p. 58. See extracts from the Congressional Record, pages 51 and 57, petition and brief for Frischer & Co.)

There have been 24 cases dealt with by the Commission under Section 316. A chart of them and their disposition is in Appendix F hereto at page

60. All but six of these were dismissed before the Commission. In five of the six, findings were submitted to the President and approved by him. The sixth case is the one here involved pending on appeal in the Court of Customs Appeals and not yet submitted to the President. A digest of the five cases submitted to the President is in Appendix G to this brief, page 61.

The significant thing is that in each case the President's practical construction of Section 316 was that findings by him were required. In the three cases in which the Commission found that unfair competition existed, the President in his orders stated that he was satisfied and found that unfair competition existed. Of the two cases in which the Commission found against the charge of unfair competition, in one the President merely approved its findings, and in the other he stated that he was not satisfied that unfair competition existed.

Section 315 of the Tariff Act (Appendix A, p. 39) deals with increases or decreases of duty to meet differences in cost of production at home and abroad. See *J. W. Hampton & Co. v. United States*, 276 U. S. 394. It contemplates findings by the President. Section 317 of the Tariff Act (Appendix B, p. 44) provides for retaliatory duties in case of unreasonable charges or discrimination by foreign countries, and uses similar expressions about findings by the President. The amendments to Section

316 made in conference are not without significance (Appendix E, p. 56). The "findings" were left to the Commission and the "decision" to the President. There can be no doubt that in all three of these sections Congress intended to provide a check upon the action of the Tariff Commission, and that in Section 316 its purpose was to provide that additional penalty duties or the exclusion of importations should not be ordered unless the President himself was satisfied with the findings of the Commission, and the statute does not make the Commission's findings, when approved by the courts any more binding on the President than the findings of the Commission where no appeal is taken.

II

THE APPEAL TO THE COURT OF CUSTOMS APPEALS PRESENTS ALL THE ELEMENTS OF A CASE OR CONTROVERSY UNLESS THE PRESIDENT'S POWER TO DISCONTINUE PROCEEDINGS BECAUSE OF HIS NONCONCURRENCE IN THE COMMISSION'S FINDINGS IS A FATAL OBJECTION

A general review of the decisions as to what is a "case" is not necessary. The subject is fully dealt with in the briefs of other counsel, and in the opinion of the Court of Customs Appeals. There is a long line of decisions in this Court on the point.

Hayburn's Case, 2 Dallas 409.

Osborn v. *United States Bank*, 9 Wheat. 738, 819.

Kendall v. *United States*, 12 Pet. 524.

United States v. *Ferreira*, 13 How. 39.

Murray's Lessee v. *Hoboken Land and Improvement Company,* 18 How. 272, 284.

Gordon v. *United States,* 117 U. S. 697.

United States v. *O'Grady,* 22 Wall. 641.

United States v. *Jones,* 119 U. S. 477.

Smith v. *Adams,* 130 U. S. 167, 173.

In Re Sanborn, 148 U. S. 222, 225.

Interstate Commerce Commission v. *Brimson,* 154 U. S. 447, 487.

Stephens v. *Cherokee Nation,* 174 U. S. 445, 477.

Pacific Whaling Company v. *United States,* 187 U. S. 447, 451.

Alexander v. *United States,* 201 U. S. 117.

Frasch v. *Moore,* 211 U. S. 1.

Muskrat v. *United States,* 219 U. S. 346.

Fairchild v. *Hughes,* 258 U. S. 126.

Keller v. *Potomac Electric Company,* 261 U. S. 428.

New Jersey v. *Sargent,* 269 U. S. 328.

Tutun v. *United States,* 270 U. S. 568.

Postum Cereal Company v. *California Fig Nut Company,* 272 U. S. 693.

Liberty Warehouse Company v. *Grannis,* 273 U. S. 70.

Fidelity National Bank v. *Swope,* 274 U. S. 123.

Federal Trade Commission v. *Eastman Kodak Company,* 274 U. S. 619, 623.

The appeal from the Tariff Commission to the Court of Customs Appeals has adversary parties. They are the importer or consignee who takes the appeal and the public, represented by the Commission, as respondent, with the possible addition of complaining domestic manufacturers or dealers.

The appeal involves the application of existing law to the facts found, and the determination whether there has been unfair competition. There is a determination of rights, that is, whether the importer who appeals has a right to import at regular tariff rates or because of business misconduct is subject to higher duties or the exclusion of his merchandise.

The action of the court is not of an administrative character.

If the order for higher duties or exclusion is made by the President and goes into effect, the judgment of the court on appeal from the Commission is conclusive against importers who are not allowed in any other tribunal or place to question as against the Government the finding that there has been unfair competition, subjecting them to the increased duty or the order of exclusion.

If the statute provided for review by the court after action by the President, or if the findings of the Commission were made conclusive on the President and he was required to accept them and make the order, there would be no doubt that the appeal to the Court of Customs Appeals would present a case or controversy. The statute relating to review of orders of the Federal Trade Commission requiring persons to desist from unfair competition differs from the one here under consideration in that the judicial review takes place after final action by the Commission, and the court enforces the order or vacates it. The statute authorizing appeal to the United States Circuit Courts of Appeals from decisions of the Board of Tax Appeals likewise differs from this one, because there the action of the court finally concludes the rights of the parties and such further administrative action as is taken must be in accordance with the decision and the Treasury Department is bound to proceed to close the case on the basis of the court's decision.

It is well settled that if the conclusion of a court in any such matter is subject to revision in an administrative department, there is no case or controversy within the judicial power. (*In re Sanborn*, 148 U. S. 222.) This case is not exactly that. We have shown that the statute does not contemplate that if the Commission finds there is no unfair competition, the President may reverse that finding and make an order for higher duties or exclusion of importations. He can not make such an order unless there is a finding of the Commission (affirmed by the Court of Customs Appeals if there has been an appeal to that court) that unfair competition exists, but he is not obliged to concur in the Commission's findings to that effect and make an order. The statute does not make the findings of the Commission more conclusive on the President where they are affirmed by the Court of Customs Appeals or by this Court on certiorari than such findings would be without such judicial review.

The result is that there is no assurance that after the court acts on the appeal, the President will take any further action, and the question is presented whether this situation deprives the judgment of the court of that finality and effective operation which are essential to a judicial judgment. As a practical matter the President may never be disposed to reject the findings of the Commission, approved by the court, that unfair competition exists. Nevertheless, under the statute he has that power.

Whether the judgment of the Court of Customs Appeals finally disposes of the matter depends on which way its decision goes. If the findings of the Commission are reversed, that seems to end the proceeding. If the finding of unfair competition is affirmed, it is still open to the President to reject the finding. The case is much the same as if a suit in equity were brought against an administrative body to restrain it from making an advisory report to an executive officer, which if accepted and approved by him would result in executive action affecting the plaintiff's interest. Doubtless such a suit would not be entertained.

The peculiarity of this case rests in the fact that judicial review is intermediate between the beginning and the end of administrative proceedings and does not review the final action of the administrative authority. A case which resembles this is the recent case of *Fidelity National Bank* v. *Swope*, 274 U. S. 123. There the charter of the city of Kansas City relating to public improvements provided for the adoption of an ordinance by the City Council authorizing an improvement and determining the benefited district and directing that the lands within the district should be assessed in proportion to their value. At that stage the administrative proceedings paused and, as provided by the law, judicial proceedings were instituted in the Circuit Court against the property owners and by the city for the purpose of determining the validity of the ordinance and of the lien for the cost of the improvement. The charter provided that after the determination of the validity of the prior administrative proceedings the administrative authorities could then proceed to complete the proceedings by apportioning the cost and levying the assessment.

The question presented in this Court was whether the resort to the court before the completion of the administrative proceedings presented a case or controversy within the Federal judicial power, and this Court answered that question in the affirmative. There, as here, a pause took place in the administrative proceedings before their completion for the purpose of a judicial inquiry as to the validity of what had been done, to be followed by completion of the administrative proceedings.

In the opinion the Court did not discuss the question whether the state statutes or city charter allowed the administrative authorities to abandon the proceedings after the judicial inquiry. The appellees' brief in that case (p. 86) states:

> In fact there was no certainty that this grading work would be done or that any contract ever would be let therefor or that any tax would be issued. * * * No contract had been let, no grading work had been done and it was not certain that any tax bills would ever be issued to become a lien upon the property in question.

The brief then cited *Tregea* v. *Modesta Irrigation District*, 164 U. S. 179, 185, quoting the following from the opinion of Mr. Justice Brewer:

> But going beyond this matter, we are confronted with the question whether, in advance of the issue of bonds and before any obligation has been assumed by the district, there is a case or controversy with opposing parties, such as can be submitted to and can compel judicial consideration and judgment. This is no mere technical question. For, notwithstanding the adjudication by the courts of the State in favor of the validity of the order made for the issue of four hundred thousand dollars of bonds, and, notwithstanding any inquiry and determination which this court might make in respect to the matters involved, there would still be no contract executed; no obligation resting on the district. All that would be accomplished by our affirmance of the decision of the state court would be an adjudication of the right to make a contract, and, unless the board should see fit to proceed in the exercise of the power thus held to exist, all the time and labor of the court would be spent in deter-

mining a mere barren right—a purely moot question.

The extract from the charter of Kansas City quoted in the note to the opinion in *Fidelity National Bank* v. *Swope* provides, after dealing with the judicial proceeding to determine the validity of the preliminary action—

> If no appeal shall be taken, or after determination of such appeal, the city may enter into a contract with the successful bidder to whom such work may be let * * *.

An examination of the charter of the city discloses provisions indicating that it was within the power of the city to discontinue the improvement proceedings after the end of the judicial proceedings at any time before the contract for the construction of the improvement was finally confirmed. The provision is—

> The Board of Public Works, at any time before any contract is so ratified, approved and confirmed, may rescind by an order entered on the records of said Board, the action of said Board in signing said contract in behalf of the city, and thereupon all proceedings had in relation to such proposed improvement shall be null and void. [*Charter and Ordinances of Kansas City, Annotated, Turpin, Kingsley, Shannon,* 1909, p. 313.]

We assume, therefore, that in deciding the *Fidelity National Bank case,* this Court had in mind the fact that it was within the power of the city to discontinue all further proceedings after the judicial determination of the validity of the preliminary administrative action and that the existence of this power did not prevent the judicial inquiry from constituting a case or controversy within the Federal judicial power.

If we may accept the decision in the *Fidelity National Bank case* as authority for the proposition that an intermediate judicial review of preliminary administrative proceedings may present a case or controversy, notwithstanding the possibility that no further action may ever be taken by the administrative authorities, then it may be said that the power of the President to refuse concurrence in the findings of the Commission and of the courts reviewing them and to discontinue the proceedings without further action does not prevent the judicial review of the Commission's action from constituting a case or controversy.

Some distinctions may be noted between this case and the *Fidelity National Bank case*. In the latter the power of the administrative authorities to discontinue proceedings after judicial review did not rest on disagreement with the judicial conclusion but on reasons of policy, while here the power of the President to discontinue the proceedings and refuse to make the final order must rest on his disapproval of the findings of the Commission and of the courts if the Commission's findings have been reviewing them and to discontinue the proceed- ciple. In each case the power to discontinue existed and the reason for it is immaterial. In this case, therefore, this Court is confronted with the question whether the constitutional courts of the United States, including this Court, have power before administrative proceedings are completed to review judicially the preliminary action, where under the law the administrative authorities for one reason or another have power to discontinue the proceedings and render the judicial judgment inoperative and moot.

Unless the decision in *Fidelity National Bank* v. *Swope* goes that far, we have been unable to find any decisions of this Court which seem to do so.

III

THIS COURT MAY FIND IT UNNECESSARY TO DO MORE THAN DECIDE WHETHER THE APPEAL TO THE COURT OF CUSTOMS APPEALS PRESENTS A CASE OR CONTROVERSY

Section 316 of the Tariff Act of 1922 attempts to confer upon this Court power to review the decisions of the Court of Customs Appeals on appeals from the orders of the Tariff Commission under the section. If such an appeal to the Court of Customs Appeals does not present a case or controversy within the Federal judicial power, this Court has no power to review the decision on certiorari, and the clause in Section 316 for certiorari from this Court is void. If that be so, the question remains whether the clause giving jurisdiction to this Court on certiorari is separable from the rest of the section. We doubt it. *International Textbook Co.* v. *Pigg,* 217 U. S. 91, 112.

The jurisdiction of this Court, if it exists, rests only on Section 316. The jurisdiction of this Court to issue writs of certiorari to review judgments of the Court of Customs Appeals was first conferred by the Act of August 22, 1914, c. 267, 38 Stat. 703, amending Section 195 of the Judicial Code. The jurisdiction of the Court of Customs Appeals was then limited to reviewing decisions of the Board of General Appraisers, afterwards named the United States Customs Court, on questions of classification of merchandise and rates of duty, and by the Act of August 22, 1914, the jurisdiction of this Court to review such decisions of the Court of Customs Appeals was limited to cases where there is drawn in question the construction of the Constitution of the United States or of treaties or to cases in which the Attorney General has filed a certificate of importance with the Court of Customs Appeals before its decision.

The Act of February 13, 1925, amending the provisions of the Judicial Code relating to the appellate jurisdiction of this Court, does not deal with the Court of Customs Appeals. If it has any application, it is only in Section 8 (a) limiting the time for applying for certiorari to three months from the date of the judgment. The result is that, but for the provisions for certiorari in Section 316 of the Tariff Act, this Court would be without jurisdiction to review the decisions of the Court of Customs Appeals in Tariff Commission cases.

Section 316 attempted to confer that jurisdiction. We do not feel able to assert that Congress would have enacted Section 316 and given the Commission the powers therein defined without review by this Court any more than we could say that it would have given the Commission and the President such powers without review by any court.

Section 645 of the Tariff Act of 1922 provides:

> If any clause, sentence, paragraph, or part *of this title* shall for any reason be adjudged by any court of competent jurisdiction to be invalid, such judgment shall not affect, impair, or invalidate the remainder of said Act, but shall be confined in its operation to the clause, sentence, paragraph, or part thereof directly involved in the controversy in which such judgment shall have been rendered. (Italics ours.)

The title referred to is Title IV.

Section 316 is found in Title III.

There is no similar saving clause relating to Section 316.

On the other hand, if this Court concludes that a case or controversy is presented by the appeal to the Court of Customs Appeals, we see no occasion for proceeding further and deciding whether the Court of Customs Appeals is a constitutional court.

We also refer to what has been said on page 1 of this brief on the jurisdiction of this Court, and which bears on the question whether, if it be held there is no case or controversy before the Court of Customs Appeals, this Court may inquire into other questions, or must dismiss this petition for want of jurisdiction to entertain it.

IV

THE UNITED STATES COURT OF CUSTOMS APPEALS IS AN INFERIOR COURT OF THE UNITED STATES ORGANIZED PURSUANT TO ARTICLE III OF THE CONSTITUTION, WITH JURISDICTION LIMITED TO CASES WITHIN THE FEDERAL JUDICIAL POWER

A short review of the legislation leading up to the organization of the court is desirable.

The Act of June 10, 1890 (c. 407, 26 Stat. 131, 136), and of May 27, 1908 (c. 205, 35 Stat. 403, 405), provided that import cases should be dealt with by the Board of General Appraisers on appeal from the decisions of the Collector and that the decisions of the Board of General Appraisers should be subject to review by the United States Circuit Courts of Appeals. The Act creating the Board of General Appraisers provided that the General Appraisers might be removed by the President.

Either the Board of Appraisers (now called United States Customs Court) is not an inferior court of the United States under Article III of the Constitution or the clause for removal of its members is invalid. The Act provided that the Circuit Courts of Appeals should review the decisions of the Board of General Appraisers de novo and that appeals by the importers to this Court might be allowed by the Circuit Courts of Appeals if those courts considered the cases of sufficient importance and an appeal by the United States to this Court was to be allowed whenever the Attorney General applied for it.

The Act of 1908 required that all evidence considered by the Circuit Courts of Appeals should be received before the Board of General Appraisers, thus limiting the Circuit Courts of Appeals to review of the action of the Board without a hearing de novo. That Act also had a provision that this Court might review decisions of the United States Circuit Courts of Appeals in the import cases, as in other cases under the Act creating the United States Circuit Courts of Appeals.

By an Act approved May 28, 1926 (c. 411, 44 Stat. 669), Congress changed the name of the Board of General Appraisers to United States Customs Court. That was done for the purpose of enabling the Customs Court to be recognized as a court in foreign countries when seeking depositions. (Cong. Rec., Vol. 67, Pt. 5, p. 4796, 69th Cong., 1st Sess.)

The United States Court of Customs Appeals was created by the Act of August 5, 1909, c. 6, 36 Stat. 11, 105, Section 28. The Act did not define the tenure of the Judges, proceeding evidently on the theory that the court was a constitutional court and its Judges had tenure during good behavior. The Act provided (p. 106):

> The Court of Customs Appeals established by this Act shall exercise exclusive appellate

> jurisdiction to review by appeal, as provided by this Act, final decisions by a Board of General Appraisers in all cases as to the construction of the law and the facts respecting the classification of merchandise and the rate of duty imposed thereon under such classification, and the fees and charges connected therewith, and all appealable questions as to the jurisdiction of said Board, and all appealable questions as to the laws and regulations governing the collection of the customs revenues * * *.

Its decisions were made final. Review of its decisions by this Court on certiorari was first authorized by the Act of August 22, 1914, c. 267, 38 Stat. 703.

If the intention of Congress as to the creation of a constitutional court is the test, the United States Court of Customs Appeals is a constitutional court. It was styled the United States Court of Customs Appeals. It was made a court of record in all respects. The absence of a provision fixing the terms of office of the Judges shows the understanding of Congress that the court was a constitutional court and that its Judges should hold office during good behavior, as provided in Article III of the Constitution. In all its dealings with the court the Congress has treated it as an inferior constitutional court.

If the jurisdiction conferred upon it is the test, it is a constitutional court. The Act creating it confined its jurisdiction to "cases." Its jurisdiction was carved out of the jurisdiction formerly conferred upon the United States Circuit Courts of Appeals, which are constitutional courts.

The cases which it has power to deal with are cases arising under the laws of the United States and within the Federal judicial power, as defined in the Constitution. Prior to the Tariff Act of 1922 its only jurisdiction was with respect to interpretation and application of Acts of Congress relating to imports, enacted pursuant to the commerce clause and to the clause authorizing Congress to levy duties. This jurisdiction was not limited to cases originating in the territories or in the District of Columbia, but included those originating in States.

The difference between constitutional courts, and legislative courts established pursuant to those clauses in the Constitution authorizing Congress to govern the territories and the District of Columbia, has been dealt with in the following cases:

Keller v. *Potomac Electric Co.*, 261 U. S. 428.

Kendall v. *United States*, 12 Pet. 524, 619.

The City of Panama, 101 U. S. 453, 460.

Clinton v. *Englebrecht*, 13 Wall. 434, 447.

American Insurance Co. v. *Canter*, 1 Pet. 511, 546.

McAllister v. *United States*, 141 U. S. 174.

The subject has been ably dealt with in the opinion of the United States Court of Customs Appeals in its decision in the appeal from the Tariff Commission.

The petitioner contends that as the Tariff Commission is not a court and the Court of Customs Appeals is an appellate court, it can not consider the appeal. Of course that is fallacious. The Constitution does not limit any inferior Court to appellate jurisdiction, and Congress may give any inferior court original jurisdiction.

There is pending in Congress legislation to transfer from the Court of Appeals of the District to the United States Court of Customs Appeals jurisdiction to review decisions of the patent commissioner. It has been held that review of such decisions constitutes an administrative act because, notwithstanding the decision on the appeal from the patent commissioner interested parties are not concluded nor prevented from litigating the same questions in suits in equity. *Postum Cereal Company* v. *California Fig Nut Company*, 272 U. S. 693.

The Court of Appeals of the District has been held to be a legislative and not a constitutional court, with power to deal with administrative questions which may not be dealt with by a constitutional court.

Because of the pendency of this legislation it will be a source of regret if the character of the United States Court of Customs Appeals is not determined in this case.

In connection with that legislation there was inserted in the Congressional Record an interesting memorandum dealing with this subject. (Congressional Record, 69th Congress, 2nd Session, Vol. 68, pt. 3, page 3181.) A copy of that memorandum is in the Appendix H to this brief, page 64.

The suggestion there made is that aside from the power to organize inferior courts conferred by Article III, Congress has implied power to organize courts to deal with its debts, its own taxes, its own grants, and its own obligations, and that the United States Court of Customs Appeals may be such a court. If such an implied power exists, we do not see why the action of Congress in creating the United States Court of Customs Appeals should be ascribed to it.

If a court organized under Act of Congress has all the characteristics of a court under Article III and only the jurisdiction of such a court, and its judges have the qualifications and tenure of judges of such a court, it would seem to be an inferior court of the United States under Article III.

Some of the judicial power which, it is said, may be conferred upon courts organized under an implied power, is such as may be given to inferior courts of the United States organized under Article III. The express power under Article III and the suggested implied power would therefore seem to overlap. Article III protects the tenure of office and compensation of judges of courts organized under it, but there is no such protection for judges of courts organized under any other power. Surely, Article III authorizes the creation of an inferior court of the United States of just such a court as the Court of Customs Appeals.

CONCLUSION

Whether a case or controversy is presented by the appeal to the Court of Customs Appeals from the findings of the Tariff Commission depends on whether the power of the President to discontinue the proceedings because of his nonconcurrence in the findings of the Commission, confirmed by the court on appeal, takes away an essential element of a judicial case or controversy by making the judgment inoperative and the decision moot.

Whatever conclusion the Court may reach on the foregoing question, it seems unlikely that it will be necessary to decide whether the United States Court of Customs Appeals is an inferior court of the United States, but if this Court proceeds to the decision of that question the conclusion should be that it is.

Respectfully submitted.

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JANUARY, 1929.

APPENDIX A

SECTION 315 OF THE TARIFF ACT OF 1922

(a) That in order to regulate the foreign commerce of the United States and to put into force and effect the policy of the Congress by this Act intended, whenever the President, upon investigation of the differences in costs of production of articles wholly or in part the growth or product of the United States and of like or similar articles wholly or in part the growth or product of competing foreign countries, shall find it thereby shown that the duties fixed in this Act do not equalize the said differences in costs of production in the United States and the principal competing country, he shall, by such investigation, ascertain said differences and determine and proclaim the changes in classifications or increases or decreases in any rate of duty provided in this Act shown by said ascertained differences in such costs of production necessary to equalize the same. Thirty days after the date of such proclamation or proclamations such changes in classification shall take effect, and such increased or decreased duties shall be levied, collected, and paid on such articles when imported from any foreign country into the United States or into any of its possessions (except the Philippine Islands, the Virgin Islands, and the islands of Guam and Tutuila): *Provided*, That the total increase or decrease of such rates of duty shall not exceed 50 per centum of the rates specified in Title I of this Act, or in any amendatory Act.

(b) That in order to regulate the foreign commerce of the United States and to put into force and effect the policy of the Congress by this Act intended, whenever the President, upon investigation of the differences in costs of production of articles provided for in Title I of this Act, wholly or in part the growth or product of the United States and of like or similar articles wholly or in part the growth or product of competing foreign countries, shall find it thereby shown that the duties prescribed in this Act do not equalize said differences, and shall further find it thereby shown that the said differences in costs of production in the United States and the principal competing country can not be equalized by proceeding under the provisions of subdivision (a) of this section, he shall make such findings public, together with a description of the articles to which they apply, in such detail as may be necessary for the guidance of appraising officers. In such cases and upon the proclamation by the President becoming effective the ad valorem duty or duty based in whole or in part upon the value of the imported article in the country of exportation shall thereafter be based upon the American selling price, as defined in subdivision (f) of section 402 of this Act, of any similar competitive article manufactured or produced in the United States embraced within the class or kind of imported articles upon which the President has made a proclamation under subdivision (b) of this section.

The ad valorem rate or rates of duty based upon such American selling price shall be the rate found.

upon said investigation by the President, to be shown by the said differences in costs of production necessary to equalize such differences, but no such rate shall be decreased more than 50 per centum of the rate specified in Title I of this Act upon such articles, nor shall any such rate be increased. Such rate or rates of duty shall become effective fifteen days after the date of the said proclamation of the President, whereupon the duties so estimated and provided shall be levied, collected, and paid on such articles when imported from any foreign country into the United States or into any of its possessions (except the Philippine Islands, the Virgin Islands, and the islands of Guam and Tutuila). If there is any imported article within the class or kind of articles, upon which the President has made public a finding, for which there is no similar competitive article manufactured or produced in the United States, the value of such imported article shall be determined under the provisions of paragraphs (1), (2), and (3) of subdivision (a) of section 402 of this Act.

(c) That in ascertaining the differences in costs of production under the provisions of subdivisions (a) and (b) of this section the President, in so far as he finds it practicable, shall take into consideration (1) the differences in conditions in production, including wages, costs of material, and other items in costs of production of such or similar articles in the United States and in competing foreign countries; (2) the differences in the wholesale selling prices of domestic and foreign articles in the principal markets of the United States; (3) advantages granted to a foreign producer by a foreign government or by a person, partnership, corporation, or association in a foreign country; and (4) any other advantages or disadvantages in competition.

Investigations to assist the President in ascertaining differences in costs of production under this section shall be made by the United States Tariff Commission, and no proclamation shall be issued under this section until such investigation shall have been made. The commission shall give reasonable public notice of its hearings and shall give reasonable opportunity to parties interested to be present, to produce evidence, and to be heard. The commission is authorized to adopt such reasonable procedure, rules, and regulations as it may deem necessary.

The President, proceeding as hereinbefore provided for in proclaiming rates of duty, shall, when he determines that it is shown that the differences in costs of production have changed or no longer exist which led to such proclamation, accordingly as so shown, modify or terminate the same. Nothing in this section shall be construed to authorize a transfer of an article from the dutiable list to the free list or from the free list to the dutiable list, nor a change in form of duty. Whenever it is provided in any paragraph of Title I of this Act, that the duty or duties shall not exceed a specified ad valorem rate upon the articles provided for in such paragraph, no rate determined under the provision of this section upon such articles shall exceed the maximum ad valorem rate so specified.

(d) For the purposes of this section any coal-tar product provided for in paragraphs 27 or 28 of Title I of this Act shall be considered similar to or competitive with any imported coal-tar product which accomplishes results substantially equal to those accomplished by the domestic product when used in substantially the same manner.

(e) The President is authorized to make all needful rules and regulations for carrying out the provisions of this section.

(f) The Secretary of the Treasury is authorized to make such rules and regulations as he may deem necessary for the entry and declaration of imported articles of the class or kind of articles upon which the President has made a proclamation under the provisions of subdivision (b) of this section and for the form of invoice required at time of entry.

APPENDIX B

SECTION 317 OF THE TARIFF ACT OF 1922

(a) That the President when he finds that the public interest will be served thereby shall by proclamation specify and declare new or additional duties as hereinafter provided upon articles wholly or in part the growth or product of any foreign country whenever he shall find as a fact that such country—

Imposes, directly or indirectly, upon the disposition in or transportation in transit through or reexportation from such country of any article wholly or in part the growth or product of the United States any unreasonable charge, exaction, regulation, or limitation which is not equally enforced upon the like articles of every foreign country;

Discriminates in fact against the commerce of the United States, directly or indirectly, by law or administrative regulation or practice, by or in respect to any customs, tonnage, or port duty, fee, charge, exaction, classification, regulation, condition, restriction, or prohibition, in such manner as to place the commerce of the United States at a disadvantage compared with the commerce of any foreign country.

(b) If at any time the President shall find it to be a fact that any foreign country has not only discriminated against the commerce of the United States, as aforesaid, but has, after the issuance of a proclamation as authorized in subdivision (a) of this section, maintained or increased its said discriminations against the commerce of the United States, the President is hereby authorized, if he deems it consistent with the interests of the United States, to issue a further proclamation directing that such articles of said country as he shall deem the public interests may require shall be excluded from importation into the United States.

(c) That any proclamation issued by the President under the authority of this section shall, if he deems it consistent with the interests of the United States, extend to the whole of any foreign country or may be confined to any subdivision or subdivisions thereof; and the President shall, whenever he deems the public interests require, suspend, revoke, supplement, or amend any such proclamation.

(d) Whenever the President shall find as a fact that any foreign country places any burdens upon the commerce of the United States by any of the unequal impositions or discriminations aforesaid, he shall, when he finds that the public interest will be served thereby, by proclamation specify and declare such new or additional rate or rates of duty as he shall determine will offset such burdens, not to exceed 50 per centum ad valorem or its equivalent, and on and after thirty days after the date of such proclamation there shall be levied, collected, and paid upon the articles enumerated in such proclamation when imported into the United States from such foreign country such new or additional rate or rates of duty; or, in case of articles declared subject to exclusion from importation into the United

States under the provisions of subdivision (b) of this section, such articles shall be excluded from importation.

(e) Whenever the President shall find as a fact that any foreign country imposes any unequal imposition or discrimination as aforesaid upon the commerce of the United States, or that any benefits accrue or are likely to accrue to any industry in any foreign country by reason of any such imposition or discrimination imposed by any foreign country other than the foreign country in which such industry is located, and whenever the President shall determine that any new or additional rate or rates of duty or any prohibition hereinbefore provided for do not effectively remove such imposition or discrimination and that any benefits from any such imposition or discrimination accrue or are likely to accrue to any industry in any foreign country, he shall, when he finds that the public interest will be served thereby, by proclamation specify and declare such new or additional rate or rates of duty upon the articles wholly or in part the growth or product of any such industry as he shall determine will offset such benefits, not to exceed 50 per centum ad valorem or its equivalent, upon importation from any foreign country into the United States of such articles and on and after thirty days after the date of any such proclamation such new or additional rate or rates of duty so specified and declared in such proclamation shall be levied, collected, and paid upon such articles.

(f) All articles imported contrary to the provisions of this section shall be forfeited to the United States and shall be liable to be seized, prosecuted, and condemned in like manner and under the same regulations, restrictions, and provisions as may from time to time be established for the recovery, collection, distribution, and remission of forfeitures to the United States by the several revenue laws. Whenever the provisions of this Act shall be applicable to importations into the United States of articles wholly or in part the growth or product of any foreign country, they shall be applicable thereto whether such articles are imported directly or indirectly.

(g) It shall be the duty of the United States Tariff Commission to ascertain and at all times to be informed whether any of the discriminations against the commerce of the United States enumerated in subdivisions (a), (b), and (e) of this section are practiced by any country; and if and when such discriminatory acts are disclosed, it shall be the duty of the commission to bring the matter to the attention of the President, together with recommendations.

(h) The Secretary of the Treasury, with the approval of the President, shall make such rules and regulations as are necessary for the execution of such proclamations as the President may issue in accordance with the provisions of this section.

(i) That when used in this section the term "foreign country" shall mean any empire, country, dominion, colony, or protectorate, or any subdivision or subdivisions thereof (other than the United States and its possessions), within which separate tariff rates or separate regulations of commerce are enforced.

APPENDIX C

SECTION 316 OF THE TARIFF ACT OF 1922 AS INSERTED IN THE BILL BY REPORT OF SENATE COMMITTEE ON FINANCE

SEC. 316. (a) That unfair methods of competition and unfair acts in the importation of merchandise into the United States, or in its sale by the owner, importer, consignee, or agent of either, the effect or tendency of which is to destroy or substantially injure an industry, efficiently and economically operated, in the United States, or to prevent the establishment of such an industry, or to restrain or monoplize trade and commerce in the United States, are hereby declared unlawful, and when found by the President to exist shall be dealt with, in addition to any other provisions of law, as hereinafter provided.

(b) That to assist the President in making any findings under this section jurisdiction is hereby conferred upon the executive department or independent establishment of the Government, or both acting in cooperation, which he shall designate to investigate any alleged violation hereof on complaint under oath or upon the initiative of such department or independent establishment.

(c) That such department or establishment shall make such investigation under and in accordance with such rules as it may promulgate and give such notice and afford such hearing, and when deemed proper by such department or establishment such rehearing with opportunity to offer evidence, oral or written, as may be deemed by such department or establishment sufficient for a full presentation of the facts involved in such investigation; that the testimony in every such investigation shall be reduced to writing, and a transcript thereof with the findings and recommendation of such department or establishment shall be the official record of the proceedings and decision in the case, and in any case where the findings in such investigation show a violation of this section, a copy of the findings shall be promptly mailed or delivered to the importer or consignee of such merchandise; that such findings and decision, if supported by evidence, shall be conclusive, unless a rehearing shall be granted by such department or establishment, or unless, within such time after entry of said decision and in such manner as appeals may be taken from decisions of the United States Board of General Appraisers, an appeal shall be taken from said finding and decision upon a question or questions of law only to the United States Court of Customs Appeals by the importer or consignee of such merchandise; that if it shall be shown to the satisfaction of said court that further evidence should be taken, and that there were reasonable grounds for the failure to adduce such evidence in the proceedings before such department or establishment, said court may order such additional evidence to be taken before such department or establishment in such manner and upon such terms and conditions as to the court may seem proper; that such department or establishment may modify its findings as to the facts or make new findings by reason of additional evidence, which, if supported by the evidence, shall be conclusive as to the facts unless within such time and in such manner an appeal shall be taken as aforesaid upon a question or questions of law only; that the judgment of said court shall be final, except that the same shall be subject to review by the United States Supreme Court upon certiorari within three months after such judgment of the United States Court of Customs Appeals.

(d) That the final findings of such department or establishment shall be transmitted with the record to the President.

(e) That whenever the existence of any such unfair method or act shall be established to the satisfaction of the President he shall determine the rate of additional duty, not exceeding 50 nor less than 10 per centum of the value of such merchandise as defined in section 402 of Title IV of this Act, which will offset such method or act, and which is hereby imposed upon such merchandise, or, in what he shall be satisfied and find are extreme cases of unfair methods or acts as aforesaid, he shall direct that such merchandise as he shall deem the interests of the United States shall require shall be excluded from entry into the United States, and upon information of such action by the President the Secretary of the Treasury shall, through the proper officers, assess such additional duties or refuse such entry; and that the findings of the President shall be conclusive, unless within ten days thereafter he shall revoke or modify the same, in which case such revocation or modification shall be conclusive.

(f) That whenever the President shall find as a fact that any merchandise is offered or sought to be offered for entry into the United States in violation of this section but has not information sufficient to satisfy him thereof, the Secretary of the Treasury shall, upon his request in writing, forbid entry thereof until such investigation as the President may deem necessary shall be completed: *Provided,* That the Secretary of the Treasury may permit entry under bond upon such conditions and penalties as he may deem adequate.

(g) That any additional duty or any refusal of entry under this section shall continue in effect until the President shall find and instruct the Secretary of the Treasury that the conditions which led to the assessment of such additional duty or refusal of entry no longer exist.

APPENDIX D

SECTION 316 OF THE TARIFF ACT OF 1922 AS IT FIRST PASSED THE SENATE AND WENT TO CONFERENCE

[Amendments made to section as reported by Finance Committee are shown, omitted matter in brackets, and new matter in italics.]

(1666) SEC. 316. (a) That unfair methods of competition and unfair acts in the importation of merchandise into the United States, or in its sale by the owner, importer, consignee, or agent of either, the effect or tendency of which is to destroy or substantially injure an industry, efficiently and economically operated, in the United States, or to prevent the establishment of such an industry, or to restrain or monopolize trade and commerce in the United States, are hereby declared unlawful, and when found by the President to exist shall be dealt with, in addition to any other provisions of law, as hereinafter provided.

(b) That to assist the President in making any findings under this section [jurisdiction is hereby conferred upon the executive department or independent establishment of the Government, or both acting in cooperation, which he shall designate] *the United States Tariff Commission is hereby authorized* to investigate any alleged violation hereof on complaint under oath or upon the initiative of such department or independent establishment.

(c) That [such department or establishment] *the commission* shall make such investigation under and in accordance with such rules as it may promulgate and give such notice and afford such hearing, and when deemed proper by [such department or establishment] *the commission* such rehearing with opportunity to offer evidence, oral or written, as [may be deemed by such department or establishment] *it may deem* sufficient for a full presentation of the facts involved in such investigation; that the testimony in every such investigation shall be reduced to writing, and a transcript thereof with the findings and recommendation of [such department or establishment] *the commission* shall be the official record of the proceedings and decision in the case, and in any case where the findings in such investigation show a violation of this section a copy of the findings shall be promptly mailed or delivered to the importer or consignee of such merchandise; that such findings and decision, if supported by evidence, shall be conclusive, unless a rehearing shall be granted by [such department or establishment] *the commission,* or unless, within such time after entry of said decision and in such manner as appeals may be taken from decisions of the United States Board of General Appraisers, an appeal shall be taken from said finding and decision upon a question or questions of law only to the United States Court of Customs Appeals by the importer or consignee of such merchandise; that if it shall be shown to the satisfaction of said court that further evidence should be taken, and that there were reasonable grounds for the failure to adduce such evidence in the proceedings before [such department or establishment] *the commission,* said court may order such additional evidence to be taken before [such department or establishment] *the commission* in such manner and upon such terms and conditions as to the court may seem proper; that [such department or establishment] *the commission* may modify its findings as to the facts or make new findings by reason of additional evidence, which, if supported by the evidence, shall be conclusive as to the facts unless within such time and in such manner an appeal shall be taken as aforesaid upon a question or questions of law only; that the judgment of said court shall be final, except that the same shall be subject to review by the United States Supreme Court upon certiorari [applied for] within three months after such judgment of the United States Court of Customs Appeals.

(d) That the final findings of [such department or establishment] *the commission* shall be transmitted with the record to the President.

(e) That whenever the existence of any such unfair method or act shall be established to the satisfaction of the President he shall determine the rate of additional duty, not exceeding 50 nor less than 10 per centum of the value of such merchandise as defined in section 402 of Title IV of this Act, which will offset such method or act, and which is hereby imposed upon [such merchandise] *merchandise imported in violation of this act*, or, in what he shall be satisfied and find are extreme cases of unfair methods or acts as aforesaid, he shall direct that such merchandise as he shall deem the interests of the United States shall require, *imported by any person violating the provisions of this Act*, shall be excluded from entry into the United States, and upon information of such action by the President,

the Secretary of the Treasury shall, through the proper officers, assess such additional duties or refuse such entry; and that the [findings] *finding* of the President shall be conclusive, unless within ten days thereafter he shall revoke or modify the same, in which case such revocation or modification shall be conclusive.

(f) That whenever the President [shall find as a fact] *has reason to believe* that any merchandise is offered or sought to be offered for entry into the United States in violation of this section but has not information sufficient to satisfy him thereof, the Secretary of the Treasury shall, upon his request in writing, forbid entry thereof until such investigation as the President may deem necessary shall be completed: *Provided,* That the Secretary of the Treasury may permit entry under bond upon such conditions and penalties as he may deem adequate.

(g) That any additional duty or any refusal of entry under this section shall continue in effect until the President shall find and instruct the Secretary of the Treasury that the conditions which led to the assessment of such additional duty or refusal of entry no longer exist.

APPENDIX F

SECTION 316 OF THE TARIFF ACT OF 1922 AS AGREED TO IN CONFERENCE

[Matter which conferees proposed to omit inclosed in brackets; matter which the conferees proposed to insert shown in italics]

(1666) SEC. 316. (a) That unfair methods of competition and unfair acts in the importation of [merchandise] *articles* into the United States, or in [its] *their* sale by the owner, importer, consignee, or agent of either, the effect or tendency of which is to destroy or substantially injure an industry, efficiently and economically operated, in the United States, or to prevent the establishment of such an industry, or to restrain or monopolize trade and commerce in the United States, are hereby declared unlawful, and when found by the President to exist shall be dealt with, in addition to any other provisions of law, as hereinafter provided.

(b) That to assist the President in making any [findings] *decisions* under this section the United States Tariff Commission is hereby authorized to investigate any alleged violation hereof on complaint under oath or upon [the initiative of such department or independent establishment] *its initiative.*

(c) That the commission shall make such investigation under and in accordance with such rules as it may promulgate and give such notice and afford such hearing, and when deemed proper by the commission such rehearing with opportunity to offer evidence, oral or written, as it may deem sufficient for a full presentation of the facts involved in such investigation; that the testimony in every such investigation shall be reduced to writing, and a transcript thereof with the findings and recommendation of the commission shall be the official record of the proceedings and [decision] *findings* in the case, and in any case where the findings in such investigation show a violation of this section, a copy of the findings shall be promptly mailed or delivered to the importer or consignee of such [merchandise] *articles*; that such findings [and decision], if supported by evidence, shall be conclusive, [unless] *except that* a rehearing [shall] *may* be granted by the commission, [or unless] *and except that*, within such time after [entry of said decision] *said findings are made* and in such manner as appeals may be taken from decisions of the United States Board of General Appraisers, an appeal [shall] *may* be taken from said [finding and decision] *findings* upon a question or questions of law only to the United States Court of Customs Appeals by the importer or consignee of such [merchandise] *articles*; that if it shall be shown to the satisfaction of said court that further evidence should be taken, and that there were reasonable grounds for the failure to adduce such evidence in the proceedings before the commission, said court may order such additional evidence to be taken before the commission in such manner and upon such terms and conditions as to the court may seem proper; that the commission may modify its findings as to the facts or make new findings by reason of additional evidence, which, if supported by [the] evidence, shall be conclusive as to the facts [unless] *except that* within such time and in such manner an appeal [shall] *may* be taken as aforesaid upon a question or questions of law only; that the judgment of said court shall be final, except that the same shall be subject to review by the United States Supreme Court upon certiorari applied for within three months after such judgment of the United States Court of Customs Appeals.

(d) That the final findings of the commission shall be transmitted with the record to the President.

(e) That whenever the existence of any such unfair method or act shall be established to the satisfaction of the President he shall determine the rate of additional duty, not exceeding 50 nor less than 10 per centum of the value of such [merchandise] *articles* as defined in section 402 of Title IV of this Act, which will offset such method or act, and which is hereby imposed upon [merchandise] *articles* imported in violation of this Act, or, in what he shall be satisfied and find are extreme cases of unfair methods or acts as aforesaid, he shall direct that such [merchandise] *articles* as he shall deem the interests of the United States shall require, imported by any person violating the provisions of this Act, shall be excluded from entry into the United States, and upon information of such action by the President, the Secretary of the Treasury shall, through the proper officers, assess such additional duties or refuse such entry; and that the [findings] *decision* of the President shall be conclusive [, unless within ten days thereafter he shall revoke or modify the same, in which case such revocation or modification shall be conclusive].

(f) That whenever the President has reason to believe that any [merchandise] *article* is offered or sought to be offered for entry into the United States in violation of this section but has not information sufficient to satisfy him thereof, the Secretary of the Treasury shall, upon his request in writing, forbid entry thereof until such investigation as the President may deem necessary shall be completed: *Provided,* That the Secretary of the Treasury may permit entry under bond upon such conditions and penalties as he may deem adequate.

(g) That any additional duty or any refusal of entry under this section shall continue in effect until the President shall find and instruct the Secretary of the Treasury that the conditions which led to the assessment of such additional duty or refusal of entry no longer exist.

APPENDIX F

DECEMBER 27, 1928.

Schedule of all complaints under Section 316 considered by the Tariff Commission

Subject	Date filed	Investigation ordered	Remarks
Briarwood pipes	Jan. 4, 1923	Aug. 11, 1923	Findings completed Apr. 26, 1926; approved by President May 13 1926.
Engraving and printing	Jan. 17, 1923		No formal complaint; dismissed Apr. 16, 1928.
Tartaric acid	Mar. 12, 1923		Dismissed without prejudice Apr. 19, 1928.
Revolvers	May 28, 1923	June 3, 1924	Findings completed July 14, 1925; approved by President June 22, 1926. T. D. 41626.
Sanitary napkins	Apr. 18, 1924	Oct. 14, 1924	Findings completed Mar. 11, 1926; approved by President May 13, 1926.
Portland cement	May 5, 1924		Dismissed without prejudice Apr. 14, 1928.
Olive oil	May 10, 1924		Dismissed Sept. 20, 1928.
Mesh bags	June 7, 1924		Dismissed without prejudice May 6, 1928.
Wrenches	Dec. 20, 1924		Dismissed without prejudice Apr. 20, 1928.
Tuning pins	Feb. 7, 1925		Dismissed Sept. 20, 1928.
Harness leather	Feb. 18, 1925		Do.
Wire rope	July 1, 1925		Do.
Granite	Feb. 25, 1926		Dismissed without prejudice May 16, 1927.
Manila rope	Apr. 14, 1926	Apr. 28, 1926	Findings completed Feb. 28, 1927; approved by President June 13, 1927. T. D. 42207.
Thermometers and barometers.	Apr. 2, 1927		Dismissed without prejudice Nov. 28, 1927.
Sodium citrate	Nov. 10, 1923		Dismissed Mar. 27, 1928.
Pineapples	Apr. 28, 1924		Do.
Cocoa butter	July 8, 1924		Dismissed June 28, 1928.
Artificial teeth	Feb. 9, 1925		Do.
Oriental rugs	Jan. 30, 1926		Dismissed Feb. 12, 1928.
Bakelite, Form C	Dec. 16, 1925	Apr. 16, 1926	Findings completed May 26, 1927; appeal taken to Court of Customs Appeals July 13, 1927. See T. D. 42037.
Dolls and doll heads	Sept. 1, 1926		Dismissed Mar. 27, 1928.
Laminated bakelite products.	Apr. 22, 1927	Dec. 22, 1927	Findings completed and sent to interested parties Mar. 22, 1928; approved by President June 1, 1928.
Wearites rugs	Aug. 26, 1927		Dismissed Mar. 27, 1928.

APPENDIX G

Digest of Cases Under Section 316 Submitted to the President

BRIERWOOD PIPES

In that case claim was made that low-grade pipes were being imported and sold at less than cost and that this was unfair. The finding of the Commission was that in the process of manufacture the grading could not be done until much work had been expended on the pipes and the method of selling defective ones below cost was not unfair. It recommended no action by the President. The President approved this report but assumed to make a finding of his own stating that the existence of unfair methods of competition "has not been established to my satisfaction."

REVOLVERS

In that case the charge was of importation of revolvers imitating in appearance those of Smith & Wesson, domestic manufacturers. Finding of the Commission was that unfair competition existed, and its recommendation was that no increase of duty would afford protection against this kind of competition, and that revolvers of certain appearance made by certain named foreign manufacturers should be excluded. The President thereupon made an order stating:

> The record of the hearings and findings of the Tariff Commission establishes to my satisfaction the existence of unfair methods and acts within the meaning of said Section 316.
>
> I am also satisfied and find that the importation and sale of such copying or simulating revolvers constitute extreme cases of unfair methods and acts as aforesaid, and that the assessment of additional duty as provided in subdivision (e) of said section 316 will not offset such unfair methods or acts.

He thereupon proceeded to find and direct that the revolvers in question made by certain named manufacturers be excluded.

SANITARY NAPKINS

The charge there was of importation of napkins in such containers and under such appearance as to deceive the public and lead it to believe that the articles were of a well-known domestic manufacture. The Commission found that there was no deception and recommended no action. The President approved the recommendation.

MANILA ROPE

The charge in that case was that rope called manila rope, containing other than pure manila fiber, was being imported and deceiving the public. The finding of the Commission sustained the charge and held that unfair competition resulted and an increased duty would afford no protection, and recommended the exclusion of rope labeled manila, which was not pure manila. The President thereupon made an order saying: " I am also satisfied and find that the importation and sale of such rope constitute extreme cases of unfair methods." He ordered the rope so labeled excluded.

CERTAIN LAMINATED PRODUCTS

The charge here was of patent infringement by importation of infringing merchandise. The Commission found infringement and resulting unfair competition, and that raising duty would not offset the unfair competition, and recommended the exclusion of the laminated products. The President found:

> The record in the investigation by the Tariff Commission establishes to my satisfaction the extents of unfair methods of competition and unfair acts within the meaning of said section 316 * * * I am also satisfied and find that the importation and sale of such laminated products constitute extreme cases of unfair methods and acts as aforesaid and that the assessment of an additional duty as provided in subdivision (e) of said section 316 will not offset such unfair methods and acts.

He ordered the offending merchandise excluded.

APPENDIX H

MEMORANDUM IN THE CONGRESSIONAL RECORD ON THE POWERS OF CONGRESS TO ESTABLISH COURTS

Congress exercises the function of creating courts under several different grants of power. It is expressly given the power of creating inferior courts to the Supreme Court of the United States in the administration of Federal justice under the grant of Article III of the Constitution. These courts exercise jurisdiction within the borders of each State in all cases described in the third article as judicial power extended by that article to the United States. Congress may create courts to exercise complete jurisdiction over the District of Columbia, as given it by reason of the exclusive governmental jurisdiction that it has over the District vested expressly by the Constitution. Congress may in the same way create courts to exercise complete and exclusive judicial jurisdiction over the Territories of the United States under that provision of the Constitution which gives Congress the right to impose needful regulations over the territory and property of the United States. This latter power is also said by Chief Justice Marshall and others to grow out of the power of the United States as a sovereign to govern the territory which it owns not, in the States. In the same way it may be properly said that were there no third article to the Constitution, the United States as a sovereign Government could create courts to decide cases arising between it and private individuals, to construe and decide questions arising between the Government and such individuals in reference to its own taxes, its own grants, and in reference to its own debts. In other words, I conceive that without the special grant of power under the third article of the Constitution Congress could exercise the power of a sovereign, create a court of claims to pass on the debts which the United States may owe to individuals, on grants of lands which it may have granted to individuals, to grants of patent rights which it may have granted to individuals, and to the construction and decision of cases arising under the customs or internal revenue laws affecting the payment of the revenue which a sovereign must collect in order that it may live. With reference to these latter courts, it may be said that the same rigid rule would not be applied to the functions which Congress may give to them as to whether they shall be purely judicial or not, as has been applied in respect to courts that exercise a Federal jurisdiction under the third article of the judicial power of the United States, as distinguished from the general administration of justice by the States within State borders, which could not exist but for the third article. In this way the Court of Claims, the Court of Customs Appeals, and a court of patents may be easily distinguished from the power of the Supreme Court and its subordinate courts under the third article in respect to limitation to strictly judicial functions.

The Supreme Court and the subordinate courts of the United States, exercising jurisdiction within the several States of the Union, all deal with cases and controversies in the sense of the third article of the Constitution, but as to courts which are not concerned with the exercise of judicial power within or affecting the several States, there is reason to believe that they stand on a different plane, and that as they are brought into being and exist in virtue of the sovereignty of the United States, and of its power to do all that is essential to the effective exercise of a government, such as aiding in the enforcement of the taxation laws, aiding in the administration and enforcement of the public land laws and the Indian laws, and in the ascertainment and determination of claims against the United States and the administration of the laws relating to the granting of patents, copyrights, and trade-marks, they may be invested with jurisdiction and powers which lie outside of and beyond the controversies and cases which are comprehended by the third article of the Constitution. Illustrations of this will be found in the court of private-land claims, which for many years ascertained and reported the facts respecting conflicting claims to lands, jurisdiction over which was ceded to the United States by Mexico, to the special Indian court, which dealt with claims to citizenship of the Five Civilized Tribes in the Indian Territory when Congress was preparing that region for admission to the Union as a State, to the Court of Claims, and especially its power and authority to examine and report on claims, at the instance of either House of Congress or at the instance of any of the executive departments of the Government. In *Gordon* v. *United States* (117 U. S. Appendix 697, 699), Chief Justice Taney said:

> "So far as the Court of Claims is concerned, we see no objection to the provisions of this law. Congress may undoubtedly establish tribunals with special powers to examine testimony and decide, in the first instance, upon the validity and justice of any claim for money against the United States, subject to the supervision and control of Congress or a head of any of the executive departments."

And while in that and other cases it is held that where the action of such a tribunal is intended to be advisory only, and in aid of legislative or administrative action, there can be no review by the Supreme Court, the cases all recognize that Congress, consistently with the Constitution, may establish special tribunals and clothe them with power to ascertain and decide facts and report them as a basis for legislative or administrative action without putting them in the form of a controlling judicial judgment.

The case of the *Postum Cereal Co.* v. *California Fig-Nuts Co.*, decided January 3, 1927, following the case of *Keller* v. *The Potomac Electric Power Co.* (261 U. S. 428), which in turn followed the case of *Baldwin* v. *Howard* (256 U. S. 35), and *Muskrat* v. *United States* (219 U. S. 346), were cases in which the jurisdiction of the Supreme Court of the United States was in question, and it was held that its power and jurisdiction as a court was limited to judicial cases and controversies and could not extend to mere decisions as by a commission or special tribunal created for the purpose of aiding governmental functions, whether legislative or administrative. [Cong. Rec. vol. 68, pt. 3, p. 3181, 69th Cong., 2d Sess.]